SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 451

WILLIAM WHITLOCK BRUSH, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX.

	Page
Proceedings in U. S. C. C. A., Second Circuit	1
Caption	1
Proceedings before United States Board of Tax Appeals	1
Docket entries	1
Petition	3
Exhibit "A"—Notice of deficiency	6
Answer	12
Memorandum opinion, Leech, M.	14
Decision	18
Statement of evidence	19
Caption	19
Statement of case for petitioner	19
Statement of case for respondent	20
Testimony of Wm. Whitlock Brush	20
Order approving statement of evidence	34
Petition for review	35
Præcipe for transcript of record	41
Clerk's certificate	42
Opinion, Chase, J.	43
Order for mandate	50
Clerk's certificate	51
Order allowing certiorari	52

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 22, 1933.

—8513-C

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

WILLIAM WHITLOCK BRUSH,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 74815.

APPEARANCES BEFORE THE BOARD:

For Petitioner—MARK EISNER, Esq., JOSEPH L. WEINER, PAUL WINDELS, EDMUND L. PALMIERI.

For Respondent—JAMES H. YEATMAN, Esq.

Docket Entries.

1934

Feb. 6, Petition received and filed. Taxpayer notified. (Fee paid).

Feb. 6, Copy of petition served on General Counsel.

Mar. 26, Answer filed by General Counsel.

Mar. 30, Copy of answer served on taxpayer.

Apr. 11, Hearing set May 21, 1934.

May 19, Order of continuance to May 24, 1934 entered.

Docket Entries.

May 24, Hearing had before Mr. Leech, Division 6, on merits.
Petitioner's brief due June 22, 1934. Commissioner's brief due 15 days later—petitioner's reply 10 days.
Appearance of Joseph L. Weiner filed.
June 2, Transcript of hearing May 24, 1934 filed.
June 22, Brief filed by taxpayer June 22, 1934 copy served.
July 6, Reply brief filed by General Counsel.

1935

June 14, Memorandum opinion rendered — Mr. Leech, Division 6, Judgment will be entered for Commissioner.
June 15, Decision entered, Mr. Leech, Division 6.
Sept. 9, Petition for review by United States Circuit Court of Appeals, 2nd Circuit, with assignments of error filed by taxpayer.
Sept. 12, Affidavit of service of petition for service filed.
Oct. 15, Agreed statement of evidence lodged.
Oct. 21, Praecipe filed, proof of service thereon.
Oct. 21, Agreed statement of evidence approved and ordered filed.

Petition.

7

UNITED STATES BOARD OF TAX APPEALS.

WILLIAM WHITLOCK BRUSH, *Petitioner,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 74815.

8

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols IT: AR: A-1: KHD—60D) dated December 9, 1933, and as the basis of his proceeding alleges as follows:

I. The address of the petitioner is 440 Park Avenue, New York, New York. His principal place of business is at Municipal Building, New York, New York.

II. The notice of deficiency (a copy of which 9
is attached hereto and marked "Exhibit A") presumably was mailed to the petitioner on December 9, 1933.

III. The taxes in controversy are income taxes for the calendar year 1931 and are for $256.27.

IV. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The inclusion in income of the sum of $14,000. as salary.

10 *Petition.*

(b) The determination that the salary received by the petitioner as Chief Engineer of the Bureau of Water Supply of The City of New York constitutes income taxable by the United States Government.

(c) The failure to determine that the petitioner received salary as an officer of The City of New York.

(d) The determination that the petitioner was during the year 1931 not engaged in the exercise
11 of an essential governmental function of the City of New York.

(e) The determination that the salary of the petitioner paid by the City of New York is taxable by the United States Government if he does not exercise an essential governmental function.

(f) The disallowance of a deduction of $276.33 as a business expense or a loss sustained in a transaction entered into for profit.

(g) The failure to allow as a deduction the difference between the amount of rent paid by
12 the petitioner and the amount received from the sub-tenant of his property.

V. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner is an individual residing at 440 Park Avenue, New York, New York. During the year 1931 he was Chief Engineer of the Bureau of Water Supply of the City of New York. He was an officer of the City of New York, holding office by virtue of statutory authority. His salary of $14,000. received in the year 1931 was paid by the City of New York.

(b) The petitioner during the year 1931, as an officer of the City of New York, had supervision over the engineering details connected with the supplying of water to the City of New York for public purposes and the supplying of water to consumers thereof residing in the City of New York.

(c) Prior to the year 1931 the petitioner leased an apartment. This apartment was sub-let to another tenant and the petitioner received income therefrom. The difference between the income received by the petitioner and the amount expended as rent for the apartment was $276.33, which constituted a deductible loss.

WHEREFORE your petitioner prays that this Board may hear this proceeding and determine that the salary of $14,000. received by the petitioner in the year 1931 is not subject to tax by the United States Government and that the sum of $276.33 constituting the difference between the amount paid by the petitioner as rent and the amount received by the sub-letting, constitutes a deduction from income, and for such other and further relief as the Board may deem proper in the premises.

Respectfully submitted,

MARK EISNER,
Attorney for Petitioner,
20 Exchange Place,
New York, New York.

16 *Exhibit A, Annexed to Petition.*

State of New York, }
County of New York, } ss.:

WILLIAM WHITLOCK BRUSH, being duly sworn, deposes and says: That he is the petitioner above-named; that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true.

WM. W. BRUSH.

Sworn to before me this 5th }
17 day of February, 1934. }

C. SULLIVAN, JR.,
Commissioner of Deeds,
City of New York,
residing in Kings County.
New York Co. Clerk's No. 188, Reg. No. 75-S-4.
Kings Co. Clerk's No. 213, Reg. No. 4048.
Commission Expires May 3, 1934.

Exhibit A.

TREASURY DEPARTMENT
18 WASHINGTON

Office of
Commissioner of Internal Revenue

Dec. 9, 1933

IT: AR: A-1
KHD-60D

Mr. William Whitlock Brush,
440 Park Avenue,
New York, New York.

Sir:

You are advised that the determination of your income tax liability for the year 1931 discloses a

deficiency of $256.27 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of the deficiency.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the form, or on the date assessment is made, which ever is earlier; WHEREAS IF THIS FORM IS NOT FILED, interest at the rate of 6% per annum will accumulate.

Respectfully,

GUY T. HELVERING,
Commissioner

By CHAS. T. RUSSELL
Deputy Commissioner

Enclosures:

Statement
Form 870

22 *Exhibit A, Annexed to Petition.*

STATEMENT

IT: AR: A-1
KHD-60D

In re: Mr. William Whitlock Brush,
440 Park Avenue,
New York, New York.

Income Tax Liability

Year	Income Tax Liability	Income Tax Assessed	Deficiency
23 1931	$256.27	None	$256.27

This deficiency in tax is based upon the report submitted to this office, by the Internal revenue agent in Charge, now located at Room 807, United States Parcel Post Building, 341 9th Avenue, New York, New York, under date of February 28, 1933 and other information on file which discloses the deficiency in tax as stated above, determined as follows:

Net loss originally reported on return	($121.55)
Add:	
24 1. Salary	14,000.00
2. Reduction in loss on rents	276.33
Corrected tofal net income	$14,154.78

Explanation of Changes

1. This office holds that the salary of $14,000.00 received by you "as Chief Engineer of Water Supply, City of New York" represents taxable income in accordance with the provisions of article 643 of Regulations 74 which provides in part as follows:

Exhibit A, Annexed to Petition.

"Compensation paid to its officers and employees by a State or political subdivision thereof for services rendered in connection with the exercise of an essential governmental function of the State or political subdivision, including fees received by notaries public commissioned by States, is not taxable. Compensation received for services rendered to a State or political subdivision thereof is included in gross income unless (a) the person receives such compensation as an officer or employee of a State or political subdivision, and (b) the services are rendered in connection with the exercise of an essential governmental function. The commissions of receivers appointed by State courts are subject to tax for 1928 and subsequent taxable years.

"An officer is a person who occupies a position in the service of the State or political subdivision, the tenure of which is continuous and not temporary and the duties of which are established by law or regulations and not by agreement. An employee is one whose duties consist in the rendition of prescribed services and not the accomplishment of specific objects, and whose services are continuous, not occasional or temporary. * * *"

It is held that the supplying of water by water plants to the residents of a community constitutes the discharge of a proprietary function as distinguished from an essential governmental function, consequently the compensation of the officers and employees of such plants is subject to Federal Income Tax.

28 *Exhibit A, Annexed to Petition.*

In the case of Flint *vs.* Stone Tracy Company, 220 U. S. 107, the United States Supreme Court stated:

> "It is no part of the essential governmental functions of a state to provide means of transportation, supply artificial light, water, and the like. These objects are often accomplished through the medium or private corporations, and though the public may derive a benefit from such
29 operations, the companies carrying on such enterprises are nevertheless private companies, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred.
>
> "The true distinction is between the attempted taxation of those operations of the states essential to the execution of its governmental functions, and which the state can only do itself, and those activities
30 which are of a private character. The former, the United States may not interfere with by taxing the agencies of the state in carrying out its purposes, the latter, although regulated by the state, the exercising delegated authority, such as the right of eminent domain, are not removed from the field of legitimate Federal taxation."

Your attention is directed also to the decision of the United States Board of Tax Appeals in the case of C. S. Denman, Volume 27, page 256.

31

2. The deduction of $276.33 claimed in schedule B of your return representing a loss sustained from the subletting of your private apartment, has been disallowed inasmuch as it is held to represent a personal expense.

Computation of Tax

Adjusted net income		$14,154.78
Less:		
Dividends	$ 303.52	
Personal Exemption	3,500.00	3,803.52
Income subject to normal tax		$10,351.26
Normal tax at 1½% on $4,000.00		60.00
Normal tax at 3% on 4,000.00		120.00
Normal tax at 5% on 2,351.26		117.56
Surtax on $14,154.78		43.10
Total		$340.66
Less:		
Earned income credit computed on $14,000.00 earned income (limited to ¼ of the normal tax on the net income plus ¼ of the surtax on the earned net income)		$ 84.39
Income tax liability		$ 256.27
Income tax assessed		None
Deficiency		$ 256.27

32

33

At the conference held in this office August 15, 1933, you were granted the opportunity to submit certain additional information in support of your

34

contentions with regard to the taxability of the salary referred to above but the same has not been submitted, therefore, this office is of the same opinion as reached at the conference.

A copy of this communication has been mailed your representative Mr. Mark Eisner, 20 Exchange Place, New York, New York, who has on file in this office a duly recorded power of attorney.

mw-1

35

Answer.

UNITED STATES BOARD OF TAX APPEALS.

WILLIAM WHITLOCK BRUSH, *Petitioner,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 74815.

36

Now comes the Commissioner of Internal Revenue, by his attorney, General Counsel, Bureau of Internal Revenue, and for answer to the petition of the petitioner, admits and denies as follows:

I and II. Admits the allegations contained in paragraphs I and II of the petition.

III. Admits that the taxes in controversy are income taxes for the year 1931, but denies the remaining allegations contained in paragraph III of the petition.

37

IV. Denies that the respondent erred as alleged in paragraph IV of the petition, subparagraphs (a) to (g) inclusive.

V. Denies the allegations of fact contained in paragraph V, subparagraphs (a) to (c), inclusive, of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's appeal be denied. 38

(Signed) ROBERT H. JACKSON.

ROBERT H. JACKSON,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
C. A. RAY,
Special Attorney,
Bureau of Internal Revenue.

39

40

Memorandum Opinion.

UNITED STATES BOARD OF TAX APPEALS.

WILLIAM WHITLOCK BRUSH, *Petitioner,* *against* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 74815.

41

MARK EISNER, Esq., JOSEPH L. WEINER, Esq., PAUL WINDELS, Esq., and EDMUND L. PALMIERI, Esq., for the petitioner.

JAMES H. YEATMAN, Esq., for the respondent.

LEECH: This proceeding seeks redetermination of a deficiency of $256.27 determined for the year 1931. There is only one issue, this being whether petitioner is exempt from income tax upon a salary received from the City of New
42 York as compensation of an officer or employee rendering service to the city in its governmental capacity.

The petitioner during the calendar year 1931 was employed as Chief Engineer of the Bureau of Water Supply of the City of New York. He has been so employed for 36 years. This is a statutory office. His duties as Chief Engineer included the protection of the water supply of New York City from pollution, the determination of the amount of water to be withdrawn from various sources, the operation of the municipal water system, supervision of personnel,

43

all matters connected with the expenditure of moneys allocated for water supply purposes and the preparation of plans, surveys and reports on improvements and installations of the water supply system.

In the early days of New York City water was furnished its citizens by private companies. In certain areas water is furnished and sold by private companies at the present time. The present water supply system of New York has been built up through the years by the construction of facilities by the city and the acquisition from 44
time to time of private companies supplying certain areas.

Water furnished by the city for business use is metered and the amount used is charged at a fixed rate. Water for private use is furnished on a flat annual sum basis which is determined in accordance with the conditions that exist with respect to the particular residence served. Approximately 75 per cent of the cost of maintaining and operating the water system of New York City is attributable to the furnishing of water for business and private use; approximately 25 45
per cent is attributable to fire protection, street sprinkling and flushing, sewer flushing, supervision of private companies and the supplying of water to communities outside of New York City.

The municipal water system of New York City has entailed an enormous expense. The cost of the facilities for bringing water from the Catskills involved an expenditure of more than two hundred million dollars. A plan for additional water supply now under consideration contemplates an expenditure of two hundred and twen-

46 ty-five million dollars. The sources of water supply of the several private companies now serving some of the outlying sections of the city are now nearing a condition of exhaustion. The water furnished by these companies is inferior to the water supplied by the municipal system. It is anticipated that the public will insist that these privately served areas be taken over shortly by the city and added to the municipal water system.

Petitioner contends that the operation of the
47 municipal water system by the City of New York is the exercise of a governmental function and that petitioner's services to the city are performed in its exercise of such function and, consequently, the salary received is exempt from Federal taxation upon the ground that the exaction of such tax would impose a burden upon the city in its governmental capacity in violation of the rule recognized by many decisions. *McCulloch* v. *Maryland*, 17 U. S. 315; *Texas* v. *White*, 74 U. S. 700; *Collector* v. *Day*, 78 U. S. 113; *Indian Motorcycle Co.* v. *United States*, 283 U. S. 570; *Burnet*
48 v. *Coronado Oil & Gas Co.*, 285 U. S. 393.

We have considered this question in several instances and have consistently held that in the operation of a water system a municipality is acting in its corporate or proprietary character and not in a governmental capacity. *C. S. Denman*, 27 B.T.A. 256; affirmed *Denman* v. *Commissioner*, 73 Fed. (2nd) 193; *T. P. Wittschen*, 25 B.T.A. 46. In *Blair* v. *Byers*, 35 Fed. (2d) 326, it was held that an attorney employed and paid by the Des Moines Municipal Water Works is not entitled to exemption from Federal Tax upon his salary received in that employment, as the

49

operation of a municipal water works was not the exercise by the city of a governmental function. See also *Illinois Trust and Savings Bank* v. *City of Arkansas City*, 76 Fed. 271; *Pikes Peak Power Company* v. *City of Colorado Springs*, 105 Fed. 1; *Omaha Water Company* v. *City of Omaha*, 147 Fed. 1.

It is contended by petitioner that a different situation is shown in the present case calling for a different conclusion, as the question of furnishing water to the population of New York City is one of such magnitude that it can necessarily 50
be done only by the city itself as the immensity of the task precludes its being performed by a private company or companies.

We do not see that a distinction could be made merely upon the basis of the size of the municipality. Such a rule would be impossible of application. Where to draw the line would be impossible, or, at least, impracticable to determine. We think the principle announced in the cited cases applies with equal force irrespective of the size of the municipality involved.

The deficiency in issue arises through respond- 51
ent's action in including in petitioner's gross income his salary received as Chief Engineer of the water supply of the City of New York. We find no error in respondent's action.

Enter:

Judgment will be entered for the respondent.

52

Decision.

UNITED STATES BOARD OF TAX APPEALS,

WASHINGTON.

WILLIAM WHITLOCK BRUSH, *Petitioner,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 74815.

53

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered June 14, 1935, it is

ORDERED and DECIDED: That there is a deficiency of $256.27 for the year 1931.

Entered June 15, 1935.

(Signed) J. RUSSELL LEACH,
Member.

54

55

Statement of Evidence.

UNITED STATES BOARD OF TAX APPEALS.

WILLIAM WHITLOCK BRUSH, *Petitioner,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 74815.

56

The following is a statement of the evidence in narrative form in the above entitled case. The case came on for hearing before the HONORABLE J. RUSSELL LEECH, Member of the United States Board of Tax Appeals, at Washington on the 24th day of May, 1934. The appearances were:

JOSEPH L. WEINER, Esq., of New York City on behalf of the Petitioner.

ROBERT H. JACKSON, Esq., General Counsel, Bureau of Internal Revenue, by JAMES H. YEATMAN, Esq., on behalf of the Commissioner of Internal Revenue. 57

STATEMENT OF CASE FOR PETITIONER.

Mr. Weiner: This case involves an alleged deficiency of income taxes for 1931, and the issue is whether the services rendered by the petitioner were services performed for a municipality, the City of New York, by which he was employed, in a governmental capacity. A very similar issue was decided in the *Denman* case, 27 B. T. A. 256. There was some difference between this case and

58 *William Whitlock Brush, direct.*

the *Denman* case, and I will ask the petitioner to take the stand.

STATEMENT OF CASE FOR RESPONDENT.

Mr. Yeatman: There is no question but that this Petitioner is an employee of the City of New York. The sole question before the Board is whether the supplying of water to the City of New York is a governmental function, and, as Counsel stated, that was decided in the case of C. S. Denman *vs.* The Commissioner of Internal
59 Revenue, 27 B. T. A. 256, and several other cases, one by the Board and several by the courts in particular one by the Supreme Court, 220 U. S. 107.

WILLIAM WHITLOCK BRUSH, petitioner, was called as a witness in his own behalf and after being duly sworn testified as follows:

Direct Examination.

I am the petitioner in this proceeding and in the year 1931 I was a civil engineer employed by
60 the City of New York as Chief Engineer of Water Supply and in the Bureau of Water Supply, Department of Water Supply, Gas and Electricity of the City of New York. I was not substantially engaged in any other occupation. I did a small amount of work that was under my direction, as civil engineer and that was all. Up to the year 1931 I had been in the employ of the City of New York for about 36 years having taken several competitive examinations for Civil Service appointments and received appointments from the classified Civil Service lists. I was in the City's employ under such classified Civil Service

61

for many years. Finally I received an appointment to the position which I held in 1931. I was a member of the City Retirement System. In the course of my duties I became familiar with the method of operation of the Department of Water Supply.

Of the expenses of the Department in 1931, 25.2% were allocated to public service, *i.e.*, service other than furnishing water to private consumers. The figure 25.2% was divided as follows: 11.8% to fire protection service; 6% to street cleaning and street flushing service; 5% to furnishing 62
water for public buildings and public use without charge; .2% to the supervision of private water companies; 2.2% to the furnishing of water to communities other than the City of New York. Water is furnished to outside communities pursuant to statutes which specifically prescribe the charge that the City may make to such other municipality. This charge is limited to the actual cost of collecting and delivering the water outside of the City.

In 1931 my duties as Chief Engineer of Water Supply were as follows: 63

In connection with the collection and storage of the water supply, my duties included the protection of the water supply from pollution, the purification of the water to free it from or to destroy polluting matter that may have entered the water supply, the determination of the amount of water to be drawn from the various sources, and the operation of the various parts of the system, for the retention of water for future use, the transportation of the water, the amount of water to be delivered through the various conduits and the treatment of the water

64 in transit and within the City limits, the delivery of the water to the various parts of Greater New York, the pumping of the water to the extent required to furnish adequate pressure, and the use of the water, both inside and outside of buildings;

As to the delivery of the water, prevention of waste and so forth, the maintenance and the operation of the high pressure fire service systems, of which there are three in Greater New York, the supervision of the personnel and mat-
65 ters connected with the expenditures of moneys allocated for water supply purposes, the preparation of plans, surveys and reports on improvements and extensions to the water supply system generally, exclusive of those for the large increase in water supply, which is allocated to the Board of Water Supply;

The preparation of plans and specifications for the extension of the distribution system, and to improve the distribution system, supervision as to the adequacy of water available and distribution of water charges for fire protection and in
66 the areas which are supplied by private water companies within the limits of Greater New York. The preparation of agreements with communities outside of Greater New York for the delivery of water to those communities, as well as the determination of the cost of the supply and the resultant rate to be charged.

I was paid my salary in 1931 by the City of New York.

As to the financial operations, the revenues collected by the Department were turned over to the General Tax Fund of the City of New York; the expenses of the department were met

67

from the moneys raised by the budget or tax levy of the City of New York, and that included my salary.

The cost of the New York City Water Supply System up to the year 1931 was approximately $480,000,000. The reproduction cost of the system would be substantially higher than that sum. The major water supply project undertaken by the Greater City since its incorporation in 1897 was the furnishing of Catskill water to the City of New York. The cost of that project was slightly in excess of $160,000,000. exclusive of the 68
second so-called city tunnel which increased the cost to about $225,000,000. The planning of that project was commenced in 1905. Other considerable projects are now being investigated and contemplated to increase the water supply of the City, of which the most substantial is the proposed Delaware System to secure water from the Delaware sources. The estimated cost of this project will be in excess of $225,000,000.

Mr. Yeatman: If your Honor please, I do not know just what the estimates or future operations of the City Water Department have to do 69
with this case, and I am just wondering what counsel for petitioner is leading up to or else I would object to it at this time.

The Member: Of course, everything that is now in the record is without objection, but we are unable to see, ourselves, the materiality.

Mr. Weiner: The purpose of this testimony, if your Honor please, is to show that the furnishing of water to the City of New York involves projects of such magnitude and problems of such scope that it would be well nigh impossible for

70 any private company to undertake them, and our point is that the City of New York in engaging in that furnishing of water, was engaging in an undertaking which it was compelled to engage in, because of the utter impossibility of securing future water supply for a city of this size, and in view of the problems which the City has to face through any private company.

The Member: That is to say it is your position that the furnishing of water to a city the size of New York is a proposition of such magni-
71 tude, financially and otherwise, that it is necessarily a governmental function because it could not be done by private individuals?

Mr. Weiner: That is one phase of it, yes, your Honor. We propose to show in connection with this Delaware project, that the carrying out of that project has been a subject of litigation between the States of New York, Pennsylvania and New Jersey, before the United States Supreme Court, in which the Supreme Court had to lay down special rules, governing the rights of ad-
gage in, because of the utter impossibility of
72 jacent States in a water supply, and litigation in which no private company could have participated, and in which the rules applicable to the litigation were created by the Supreme Court, based on the ordinary principles of common law and based on the principles of equity which should, in the opinion of the Supreme Court, maintain as between sovereign States. The litigation was extremely exhaustive. There is an opinion of the Supreme Court, and a very substantial report of the Special Master appointed by that court in connection with that project which illustrates the character of the problem involved.

73

The Member: Proceed.

Mr. Weiner: I should like, at this point, to make a part of the record, either by offering a copy, or by reference, the opinion or report of Charles M. Burch, Special Master in the matter of State of New Jersey, plaintiff, *vs.* State of New York and City of New York, defendants. Commonwealth of Pennsylvania, Intervener, No. 16 original.

Mr. Yeatman: Is that offered in evidence?

Mr. Weiner: Yes.

Mr. Yeatman: I object to the tender.

74

Upon objection the Board refused the tender, granting permission to the petitioner to call the attention of the Board to the documents or any part thereof in petitioner's brief.

Cross-Examination.

The City of New York has always furnished the water for its own use and for the use of its inhabitants so far as its major sources of supplying areas are concerned. That is, the old City of Brooklyn and the old City of New York have always been furnished with a public water supply except that in New York, prior to about 1833 or 1830, there was a small system that was installed and operated by a private company, which served water to the City and also to the citizens. That was for just that early period of New York City's existence. There are areas today supplied by private companies within Greater New York. The City of New York includes five boroughs. The County of Bronx, known as the Borough of the Bronx; the County of New York, known as the Borough of Manhattan; the County of Kings, known as the Borough of Brooklyn; the County

75

76 of Queens, known as the Borough of Queens, and the County of Richmond, known as the Borough of Richmond.

In the Borough of Brooklyn there is the Flatbush territory which was the old town of Flatbush, and now is the 29th Ward of the Borough of Brooklyn, is today furnished with water by a private company. That represents about one-tenth of the population of that borough. In other words about 240,000 people in the City of Brooklyn are supplied with water by a private corpo-
77 ration which sells the water to them.

As to that water, I supervise the quality, the adequacy of the volume of water available, to meet the demands of that area, the adequacy of the distribution system and the sufficiency of the hydrants that are installed, for fire extinguishment, and other public uses and the charges made for water supply for public uses, and in general, perform the general supervision over the supplying of water to that part of the inhabitants of Brooklyn that get the water from the private company, exclusive of domestic rates, with which
78 we have nothing to do.

This private corporation acquired the right to furnish water under an agreement with the officials of the former town of Flatbush, before it became part of Brooklyn, and the supplying of the water was fixed by the terms of that agreement and an act of the legislature authorizing the continuance of the furnishing of water after the consolidation.

That corporation does not have to pay anything to the City of Brooklyn or the City of New York, for being allowed to sell this water to citizens, as an actual sale of water. They are

79

subject to the usual tax provisions, but not any special charge or payment for the privilege of selling water.

The Borough of Bronx does not have a private company operating a water supply system. In the Borough of Queens there are two private water companies that are of substantial size and two that are supplying just a few customers. One is a subsidiary of the Long Island Railroad Company and is used almost exclusively for supplying the needs of the railroad. They may have perhaps a half dozen customers. The other small 80
company is a company that operates as part of the terms of lease that it holds from the City of New York for what is known as Broad Channel Island, where the company is authorized to furnish a water supply for domestic use and fire protection in the area covered by the lease. These companies come under my supervision, although that supervision is rather small because of the slight public use of that water supply.

The salary paid to me is in connection with my services rendered for all the boroughs constituting the Greater City of New York. There 81
is no direct contribution by the other boroughs to the operation of the Water Supply System, that is, none of the revenues derived from the sale of water is used as such for the maintenance or operation thereof.

The charge for water is determined as follows: For business use a City ordinance requires a meter to be placed on each pipe delivering water from the Public Water Supply System into the premises and the consumer pays according to what the meter shows; the domestic portion is almost universally supplied on the so-called

82 frontage rate where a charge is set up on the size of the building, the number of families, the number of certain types of fixtures and the number of other elements determining the volume or usage irrespective of the size of the building; that is, the residential portion is furnished on a flat annual sum basis, determined by the conditions that exist with respect to each residence.

The charges are paid to the City Collector, which is a branch of the Department of Finance in the City of New York, and are not collected
83 by the Water Department. The Water Department collects a small amount of money for municipal use, some of which is for the sale of water and some for the use of water under the control of the Water Department:

The percentage of the expenses of the department as applied to different departments of the Water Supply or divisions of the Water Supply, was as follows: The percentage for fire protection was 11.8 per cent.; for street sprinkling and flushing and flushing of sewers, 6 per cent.; for other public use, delivering water where no pay-
84 ment is made, 5 per cent.; for the supervision of the private water companies, exclusive of the fire protection feature of their work, .2 per cent.; and for the water supplied to the communities outside of New York City, under the laws governing the furnishing of such water, 2.2 per cent.; making a total of 25.2 per cent.

The other 75 per cent. goes for furnishing of water for the business use and for domestic purposes of those who reside in New York City and are not supplied in those areas where private companies furnish a supply to a restricted area.

85

Redirect Examination.

Of the total water sold to private consumers by the City of New York, in round figures, 25 per cent. is sold under meter service and 75 per cent. under flat charge. From that 75 per cent. there is deducted that which is not paid for or which is for public use.

As previously mentioned, certain private companies serve limited areas of the Boroughs of Brooklyn and Queens but there are no private companies furnishing water in any of the other boroughs. There were at different times numerous private water companies serving limited areas within what is now the Greater City of New York but these were, from time to time, absorbed into the City System.

86

Q. And to your knowledge was that the result of public demand for such absorption?

Mr. Yeatman: I object.

The Member: Objection sustained.

Mr. Weiner: Exception,

The Member: Exception noted.

87

Q. To your knowledge has objection been made to any phase of the service of such private companies as are still furnishing water within the limits of the Greater City?

Mr. Yeatman: I object to that, too, your Honor, as irrelevant, immaterial and incompetent. I don't see what it has to do with this case.

The Member: How has that any bearing on the issue?

Mr. Weiner: My point is to show, your Honor, that the private companies, within the City of

88 New York, do not furnish water or the quality or pressure or, in some cases, at the prices charged by the City of New York, and that it is the result of the insistence of the citizens of New York that the City furnish them with water of the quality supplied by the municipal water department and of the pressure supplied by the municipal water department, that has caused the absorption of these private companies. The City has not—and I propose to give certain figures on that in a moment—engaged in this enterprise for
89 profit, and it has been moved to do so, first by necessity, in so far as total volume is concerned, which could not be supplied by private companies, and also from the fact that the private companies have not supplied satisfactory service, according to such supervision as the City has had authority to impose upon them.

The Member: Suppose that the City of New York were dissatisfied with the drugstore service they were receiving in the city and they adopted an ordinance and proceeded to organize and furnish to city-owned drugstores drug service, would
90 the fact, or either of the facts, that you referred to a few moments ago as to which you have directed questions to the witness, that the reason for the absorption by the city of the small water companies furnishing water to these districts into the municipal owned system, was the unsatisfactory service and the price charged for the private-furnished water—do you think that a similar reason in the case of the drug industry, would make it a governmental function?

Mr. Weiner: I do not believe that question was entered into, your Honor. The water supply,

91

in ordinary times, or in modern times, is almost unique.

The Member: We will agree that there is a difference in the furnishing of drugs and that of water, but what we cannot see, for the moment at least, is how the objection by a number of people to the service furnished by a private company has anything to do with the characterizing of the function as a governmental rather than as a proprietary function.

Mr. Weiner: If the private companies find themselves unable, as I believe most of the companies now serving in New York today are unable to furnish water of a requisite quality and of a requisite pressure, in order to supply the citizens of the city at the present time with such service as we believe they are entitled to and as we believe is furnished elsewhere, then, in our judgment it becomes our duty to see that service is furnished, and if the only available means of supplying it is by the municipality, we think it is the duty of the city.

92

The Member: Objection overruled.

To my knowledge objection has been made to a phase of the service of such private companies as are still furnishing water within the limits of the Greater City.

93

Q. In your judgment, Mr. Brush, is the quality of water supplied by a private company in New York City equal to the quality of water supplied by the City of New York?

Mr. Yeatman: I object to that, for the same reason that I objected to the last question. I cannot see where it is relevant.

94 *William Whitlock Brush, redirect.*

The Member: How far do you expect to go, Mr. Weiner?

Mr. Weiner: Just about two or three more questions.

The Member: Objection overruled, and exception noted.

The quality of the water supplied by the private companies is not equal to that furnished by the City of New York. In the case of the Flatbush Company all of the supplies are from local
95 sources, that is, water taken from under the ground in the immediate vicinity of the consumer, the limit of the available supply has been passed, and the supply has reached the point where it is essential that some action be taken to substitute some other source of supply in the very near future. In Woodhaven it is very rapidly reaching a situation similar to Flatbush. In the other areas, the time is further off but the situation is one where ultimately it will all have to be done, because they are all local sources under the ground, and they are hard waters, waters high in chlorine.

96 In my judgment as an Engineer there is very close relation between water supply and sewage disposal. The amount of water to be disposed of as sewage is almost exactly the amount of water which is furnished by the water supply for the community less the amount that is used for irrigation and similar purposes which does not reach the sewer. There is also a relation between the disposition of sewage and the sources of water supply. The question of how the sewage is disposed of has a very vital effect on the question of the potability or purity of the water supply and its suitability for human consumption.

William Whitlock Brush, recross.

97

Q. Are you able to state the total receipts derived by Greater New York City from the supply of water, and the total expenses incurred in such supply?

A. For the year 1931?

Q. No, since the Greater City was formed.

Mr. Yeatman: I object to that. I think he can state what they were in 1931, but I do not think that anything after that is material. The year is 1931.

Mr. Weiner: I will be glad to state both the figures for 1931 and the aggregate, including that period. My point is simply to show that the City of New York has spent more for the furnishing of the water than its actual receipts and up to the end of 1932, approximately $4,000,000.

98

The Member: Objection overruled.

From the time the Greater City was formed to the end of 1931 receipts in connection with the water supply were about a half million dollars less than the expenditures connected with the furnishing of the water supply for New York City based on the annual charges, and not on the construction charges which are not included. For the year 1932 there was a deficit of about $1,000,000; and for the year 1933 a deficit of about $7,000,000.

99

Re-cross Examination.

In 1931 alone there was as I recall a deficit of a few hundred thousand dollars.

Q. You stated that there was direct relationship between water supply and sewage. Did I understand you to say that?

A. Yes.

William Whitlock Brush, recross.

100

Q. By that you mean that what water goes into a system naturally has to come out?

A. Yes.

The water furnished by private companies is not equal to the quality of the water furnished by the City itself. I supervise the water furnished by these private companies. I have not undertaken to make that water of as good quality as the water furnished by the City as to its suitability or desirability for domestic supply, but as to its sanitary quality. There is no question that water

101 is of satisfactory sanitary quality. It does not endanger the health as far as its bacteriological contents are concerned.

Both sides rest.

The foregoing evidence is all of the material evidence in use at the hearing before the Board of Tax Appeals and the same is hereby approved by the undersigned.

PAUL WINDELS,
Attorney for the Petitioner.

102

ROBERT H. JACKSON, Esq.,
General Counsel,
Bureau of Internal Revenue, as
Attorney for the Commissioner of Internal Revenue.

Approved and ordered filed this 21st day of Oct., 1935.

(s) J. RUSSELL LEECH,
Member.

Petition for Review.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

WILLIAM WHITLOCK BRUSH,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

To the Circuit Court of Appeals for the Second Circuit:

Your Petitioner, William Whitlock Brush, respectfully shows:

FIRST: This is a proceeding for review by the United States Circuit Court of Appeals for the Second Circuit of a decision of the United States Board of Tax Appeals entered on the fifteenth day of June 1935 adjudging that there is a deficiency of $256.27 for the year 1931 in the income taxes reported on the Petitioner's income tax return for the said calendar year.

SECOND: The Petitioner is an individual now residing at 528 West 238th Street, in the City and State of New York. Petitioner's tax return for the year 1931 was made to the Collector of Internal Revenue, Third District, State of New York, which is within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

106 *Petition for Review.*

THIRD: The nature of the controversy before the Board of Tax Appeals was the determination of the Petitioner's income tax for the year 1931 and involves the determination of

(1) The question of whether the Commissioner of Internal Revenue was in error in adding to and including in Petitioner's income for 1931, as subject to taxation, a salary of $14,000 paid the Petitioner as Chief Engineer of the Bureau of Water Supply by the City of New York, and in
107 disallowing Petitioner's claim that the said salary income was exempt and immune from taxation by the United States Government.

FOURTH: The errors committed by the Board of Tax Appeals upon which the Petitioner relies as the basis of this proceeding are as follows:

(1) The Board erred in its conclusion that there is a deficiency of $256.27 in Petitioner's tax for 1931 and in sustaining the determination of the Commissioner of Internal Revenue to that effect.

108 (2) The Board erred in failing to reverse the determination of the Commissioner of Internal Revenue that there was a deficiency in Petitioner's tax for 1931.

(3) The Board erred in refusing to find that the Commissioner of Internal Revenue was in error in adding to and including in Petitioner's income for 1931, as subject to taxation, the compensation paid to the Petitioner as Chief Engineer of the Bureau of Water Supply by the City of New York; and in disallowing Petitioner's claim that the said salary income was exempt and immune from taxation.

109

(4) The Board erred in its conclusion that Petitioner's compensation paid by the City of New York for the year 1931 was not exempt and immune from taxation and deductible from Petitioner's taxable income.

(5) The Board erred in refusing to find that Petitioner's salary compensation was for services rendered by an officer of a political subdivision of the State of New York in connection with the exercise of an essential governmental function and as such exempt and immune from taxation by the United States government.

110

(6) The Board erred in refusing to find that Petitioner's salary compensation was for services rendered by an officer of a political subdivision of the State of New York in connection with the exercise of usual, necessary and/or proper governmental functions and as such exempt and immune from taxation by the United States Government.

(7) The Board erred in refusing to find the Petitioner's salary compensation was for services rendered by an officer of a political subdivision of the State of New York in connection with the exercise of a public function and as such exempt and immune from taxation by the United States government.

111

(8) The Board erred in failing to find that the public service rendered by, and the magnitude of the operations of the City of New York in connection with its water supply system and in supervising, protecting, installing, improving and controlling the same and the practical public need for such functioning by the City of New

112

York constitutes such service and operations a necessary and essential governmental function and as such, in all respects, exempt from interference on the part of the United States Government by taxation of either its operation or personnel.

(9) The Board erred in failing to find that the City of New York was performing an essential and/or proper governmental function in operating, maintaining, supervising, and controlling its system of water supply.

113

10) The Board erred in failing to find that by reason of the error assigned in the next preceding paragraph the compensation of the Petitioner for services in connection with the aforesaid governmental function was exempt and immune from taxation by the United States Government.

(11) The Board erred in failing to find that the imposition of a tax upon Petitioner's salary received from the City of New York constitutes an interference with and burden upon the City of New York, a political subdivision of a sovereign state, and an instrumentality thereof by the United States Government.

114

(12) The Board erred in failing to find that the imposition of a tax upon Petitioner's salary received from the City of New York constitutes an interference with and impairment of the appropriate exercise of its governmental function by the City of New York, a political subdivision of a sovereign state by the United States Government.

(13) The Board erred in failing to find that the imposition of a tax upon Petitioner's salary re-

115

ceived from the City of New York constitutes an impairment of and interference with the appropriate exercise of a governmental function by the City of New York for the citizens thereof and in the interest of the health and public welfare of the People of the State of New York, by the United States Government.

(14) The Board erred in failing to find that the City of New York in all respects treated its operation, maintenance and supervision of a water supply system and all the incidents, including expense and income, thereof, as a governmental function.

116

(15) The Board erred in failing to find that a sovereign state and the political subdivisions thereof may determine for themselves the scope of their governmental function.

(16) The Board erred in failing to find that the performance of such function by the City of New York pursuant to its determination of the scope of its governmental functions as set forth in the two next preceding paragraphs cannot be interfered with, or impaired by taxation by the United States Government.

117

(17) The Board erred in rendering decision for the Respondent.

WHEREFORE: Your Petitioner prays that this Court may review the action of the Board of Tax Appeals in this Court, reverse the decision of the Board and direct the entry of a decision by said Board in favor of the Petitioner determining that there is no deficiency in income taxes for the year 1931 due from the Petitioner and for such

118 *Petition for Review.*

other further and different relief as may to this Court appear proper in the premises.

WILLIAM WHITLOCK BRUSH.

PAUL WINDELS,
Attorney for Petitioner,
Municipal Building,
Borough of Manhattan,
New York City.

UNITED STATES CIRCUIT COURT
119 OF APPEALS,
FOR THE SECOND CIRCUIT.

WILLIAM WHITLOCK BRUSH,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

120 State of New York, }
County of New York, } ss.:

WILLIAM WHITLOCK BRUSH, being duly sworn, deposes and says: That he is the petitioner above named and that he has read the foregoing petition and knows the contents thereof and that the statements therein contained are true to the best of his knowledge and belief and that said petition is filed in good faith.

WILLIAM WHITLOCK BRUSH.

Subscribed and sworn to before me }
this 5th day of September, 1935. }

FREDERICK W. HAUPTMAN,
Notary Public,
New York Co.

Praecipe.

121

UNITED STATES BOARD OF TAX APPEALS.

WILLIAM WHITLOCK BRUSH, *Petitioner,* *v.* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 74815.

To the United States Board of Tax Appeals: 122

You will please prepare within sixty (60) days from the date of the filing of the petition for review in the above entitled case and transmit to the clerk of the United States Circuit Court of Appeals for the Second Circuit certified copies of the following documents:

1. Transcript of docket entries.
2. Pleadings before the Board.
   Petition with letter and statement annexed.
   Answer to petition.
3. Opinion. 123
4. Decision of the Board.
5. Petition for Review.
6. Statement of evidence as settled.
7. Praecipe.

The foregoing to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, this 14th day of October, 1935.

PAUL WINDELS,
Attorney for Petitioner,
Municipal Building,
New York, N. Y.

124

Clerk's Certificate.

UNITED STATES BOARD OF TAX APPEALS,

WASHINGTON.

WILLIAM WHITLOCK BRUSH, *Petitioner,* *against* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 74815.

125

I, B. D. GAMBLE, Clerk of the United States Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 40 inclusive contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of
126 Tax Appeals at Washington in the District of Columbia this 30th day of October, 1935.

B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

(24715) 127

Opinion.

UNITED STATES CIRCUIT COURT
OF APPEALS,

FOR THE SECOND CIRCUIT.

WILLIAM WHITLOCK BRUSH,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent. 128

Before—MANTON, L. HAND and CHASE,
Circuit Judges.

Petition to review a decision of the Board of Tax Appeals upholding the action of the Commissioner of Internal Revenue in including in the taxable income of the petitioner for the calendar year 1931 the salary he received in that year from the city of New York as chief engineer of its Bureau of Water Supply. Affirmed.

129 COTTON, FRANKLIN, WRIGHT & GORDON, of New York City (BOYKIN C. WRIGHT and CHARLES C. PARLIN, both of New York City, of Counsel), for Petitioner.

FRANK J. WIDEMAN, Asst. Atty. Gen., and SEWALL KEY and JOSEPH M. JONES, Sp. Asst. to Atty. Gen., for Respondent.

JOHN J. BENNETT, JR., Atty. Gen., of State of New York, HENRY EPSTEIN, Sol. Gen., of State of New York, of Albany, N. Y., and PAUL WINDELS, Corp. Counsel, of New York City (JULIUS HENRY COHEN and AUSTIN J. TOBIN, both of New York

130

City, on the brief), for the State of New York.

July 13, 1936.

CHASE, Circuit Judge:

The deficiency in controversy was created by including in the 1931 taxable income of the petitioner the salary he received in that year from the city of New York as compensation for his services as the chief engineer of its Bureau of Water Supply. It was taxed in supposed com-

131 pliance with the provisions of section 22 of the Revenue Act of 1928 (45 Stat. 791 [26 U. S. C. A. §22 and note]) defining "gross income" to include "gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid," and T. R. 74 Art. 643, which recognizes the immunity from federal taxation of the compensation "paid to its officers and employees by a State or political subdivision thereof for services rendered in connection with the exercise of an essential governmental function of the State or political sub-

132 division * * *."

During 1931, the petitioner was regularly employed, as he had been previously for many years, by the city of New York as the engineer in charge of its Bureau of Water Supply. This was a statutory office for which he had duly qualified. He was paid a fixed salary and was charged in general with the responsibility for supervising the maintenance of an adequate supply of pure and wholesome water for the city of New York and its inhabitants. The water for public and private use in that city for the most part, though not wholly, comes from an enormous system owned by the city which has cost

133

about half a billion dollars and which must be still further enlarged to meet the ever growing demands upon it. Petitioner's duties require him to make surveys, plans and reports relative to improvements and enlargements of the system as well as to maintain in good condition the reservoirs, mains and equipment already possessed.

The carrying charges are paid from the general funds of the city into which goes all revenue received from the sale of water to private consumers for household, commercial or other use. Large annual deficits in operation have been incurred which have been, or are to be, paid out of the general funds of the city. About twenty-five per cent of the expenses of operation are properly allocated to the furnishing of water for public service, i. e. fire protection; street cleaning and the like; and the remainder to supplying private consumers with water for which compensation is received and carried into the city's general funds.

134

The issue presented is whether the supplying of water by the city of New York in kind and quantity sufficient to meet the needs of its inhabitants and itself is such a governmental function that it comes within the implied constitutional immunity from federal taxation which is enjoyed by every state and its political subdivisions.

135

It is said with much force in support of the petitioner's claim that his salary may not be taxed by the federal government that the problem of water supply in the city of New York can only be met by the city in the exercise of its governmental power and the use of public money; that the very magnitude of the task makes it essential that the city perform it; and that being so, it has become and is an essential governmental

136

function. It has been shown that the supplying of water in the city was in early times partly done at the expense of the municipality and that the city government has increasingly taken over the work until now only a comparatively negligible amount of the total is privately furnished; but it is not equally clear that private enterprise adequately encouraged could not do it as well. To say that it could not in the light of common knowledge as to modern private achievement in business on a vast scale would seem to deny

137

probability. In any event such an assertion is not adequately supported by evidence in this record.

As recognized in Metcalf & Eddy *v.* Mitchell, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384, there is no way to state in terms of general application just what instrumentalities either of a state or of the nation are exempt from taxation by the other. In a federation like ours where two governments, each supreme in its own sphere, exercise sovereign powers in the same territory there must be some measure of accom-

138

modation to permit each to exist so supreme. Both must raise revenue by taxation, and each must itself be free from taxation by the other. That neither may tax the other was established as long ago as McCulloch *v.* Maryland, 4 Wheat. 316, 4 L. Ed. 579. And that is still a fundamental principle. Helvering *v.* Powers, 293 U. S. 214, 55 S. Ct. 171, 79 L. Ed. 291. See, United States *v.* State of California, 297 U. S. 175, 56 S. Ct. 421, 80 L. Ed. . Nor where the principle is applicable does it matter that the amount of the proposed tax and the resulting interference with the taxed government is great or small for the immunity is absolute whenever it does exist. Johnson *v.* Maryland, 254 U. S. 51, 41 S. Ct. 16, 65 L. Ed. 126. But the

139

principle itself is limited by that from which it arises, i. e. the need to preserve our dual system of government and does not extend beyond that necessity. Indian Motocycle Co. *v.* United States, 283 U. S. 570, 51 S. Ct. 601, 75 L. Ed. 1277. So where the burden is not direct but only remote it falls within the realm of necessary accommodation and there is no immunity. See Willcuts *v.* Bunn, 282 U. S. 216, 51 S. Ct. 125, 75 L. Ed. 304, 71 A. L. R. 1260; Fox Film Corporation *v.* Doyal, 286 U. S. 123, 52 S. Ct. 546, 76 L. Ed. 1010.

That the supplying of water by the subdivision 140
of the government of the City of New York from which the petitioner derives the salary which has been taxed is the furnishing to the inhabitants of the city of something indispensable to them cannot be gainsaid. That does not of course mean that the city government must do it either to provide the people with water or, what is closer to the issue here, to exist as a municipal subdivision of the government of the state of New York. Quite as necessary to the well being of the people is an opportunity to purchase an adequate supply of proper food and clothing yet no 141
one would, we suppose, undertake to maintain that if the city government took over that business it would be engaging in an activity necessary to its existence as a government. More nearly at hand, perhaps, is the supplying of gas and electricity but when, if at all, that comes about it will hardly be said that governmental existence as such, required it. On the contrary, due regard must be had to distinguish between those activities which, though impressed with a public interest and sometimes, even often, performed by government are nevertheless done in a proprietary capacity in supplying to the public

142 for a direct charge what it could, and otherwise would, procure from private sources and those services which have become the usual activities of government because purely governmental power is in some degree essential to their performance. When a state government or one of its subdivisions engages, however rightfully, in something beyond that field, and to which but for that extension the federal taxing power would reach, there is no immunity. Helvering *v.* Powers, 293 U. S. 214, 225, 55 S. Ct. 171, 79 L. Ed. 291.
143 The test, however phrased, is one of keeping the federal and state governments in a position to be supreme within the scope of their own sovereignty by keeping the taxing power of each from preventing, or substantially interfering with, the exercise by the other of those powers necessary to its supremacy as a government within its own field.

Consequently it is not enough to make the petitioner's salary immune from federal taxation upon constitutional grounds, when it otherwise falls within the taxing statute passed by congress,
144 that he is engaged in work for which the city pays him, and that it is a necessary part of the cost of the performance of a service which has long been provided by the city to its inhabitants either from choice or convenience. That which is a proprietary function of a state government when undertaken, and so not immune from federal taxation, does not change its character because of its continued exercise. Were that not so every extension of one government into activities over which the taxing power of the other normally extended would to that extent in the course of time curtail the sources of revenue of the other which would be helpless before the

145

encroachment. South Carolina *v.* United States, 199 U. S. 437, 26 S. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737. The petitioner's work in furtherance of the supply of water by the city of New York as above outlined and for which he has been paid the salary taxed is not, in the light of the foregoing considerations, part of what his employer has to do to perform its necessary functions as a political subdivision of the state of New York. So the salary of the petitioner was not part of the expense attendant upon the exercise of what may be said to be usual governmental powers, Helvering *v.* Powers supra, or in the doing of what the states have traditionally engaged. United States *v.* California, supra. On the contrary the furnishing of water has been classed as non-essential to the exercise of governmental functions. Flint *v.* Stone Tracy Co., 220 U. S. 107, 172, 31 S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; Canavan *v.* City of Mechanicville, 229 N. Y. 473, 128 N. E. 882, 13 A. L. R. 1123; In re Water Comrs. of White Plains, 176 N. Y. 239, 68 N. E. 348; Armstrong & Latta *v.* Philadelphia, 249 Pa. 39, 94 A. 455, Ann. Cas. 1917B, 1082; Omaha Water Co. *v.* City of Omaha (C. C. A.) 147 F. 1, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614. Being engaged in work which was a part of the proprietary, or business, activities of the city the petitioner earned a salary which was income to him subject to federal taxation. Denman *v.* Commissioner (C. C. A.), 74 F. (2d) 193; Blair *v.* Byers (C. C. A.), 35 F. (2d) 326. Our decision in Commissioner *v.* Ten Eyck, (C. C. A.) 76 F. (2d) 515, was controlled by the traditional supervision exercised by government over sea ports and stands apart from the decisive features here.

146

147

Affirmed.

148

Order for Mandate Filed July 20, 1936.

UNITED STATES CIRCUIT COURT
OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 20th day of July, one thousand nine hundred and thirty-six.

149

Present: Hon. MARTIN T. MANTON,
Hon. LEARNED HAND,
Hon. HARRIE B. CHASE, Circuit Judges.

WILLIAM WHITLOCK BRUSH,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

150

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

WM. PARKIN,
Clerk.

Clerk's Certificate.

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, certify that the foregoing pages, numbered from 1 to 48, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

WILLIAM WHITLOCK BRUSH,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 31st day of August, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the said United States the one hundred and sixty-first.

WILLIAM PARKIN,
Clerk.

[SEAL]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 16, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX

	PAGE
Petition	1
Brief in support of petition	5
Preliminary statement	5
Opinion	7
Questions presented	8
Argument	9
1. The proper protection of municipalities from federal interference requires that "usual governmental function" be defined pragmatically. Excessive strictness of definition should be avoided. The supply of pure water to a metropolis is a "usual governmental function"	9
2. A conflict among the circuits is plainly discernible	13
3. The rule of decision adopted by the Court below will create confusion as to the legal limits of the taxing power of the Federal Government and of the States	15
Conclusion	15

Table of Cases Cited.

	PAGE
Block v. Hirsh, 256 U. S. 135	13
Columbus v. Mercantile Trust Co., 218 U. S. 645	11
Flint v. Stone Tracy Co., 220 U. S. 107	9, 10, 11
Halsey v. Helvering, 75 F. (2d) 234	2, 7, 14
Helvering v. Powers, 293 U. S. 214	2, 9, 14
Hoskins v. Commissioner of Internal Revenue, 84 F. (2d) 627	2, 10, 14
Jamestown & Newport Ferry Co. v. Commissioner of Internal Revenue, 41 F. (2d) 920	8, 14
Matter of Board of Water Supply, 211 N. Y. 174	12
Matter of City of New York, 234 N. Y. App. Div. 890	13
Matter of Gillespie, 272 N. Y. 18	13
Matter of Van Etten v. City of New York, 226 N. Y. 483	12
McGovern v. City of New York, 229 U. S. 363	12
New Jersey v. New York, 283 U. S. 336	6, 12
New York City v. Pine, 185 U. S. 93	6, 12
People ex rel. Burhans v. City of New York, 198 N. Y. 439	12
South Carolina v. United States, 199 U. S. 437	10

Supreme Court of the United States

No. . October Term, 1936.

WILLIAM WHITLOCK BRUSH,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of William Whitlock Brush, petitioner-appellant below, respectfully shows:

I. Your petitioner, until lately the Chief Engineer of the Bureau of Water Supply of the City of New York, applied to the Court below for the review of the determination of the United States Board of Tax Appeals to the effect that his salary, paid for services rendered in that capacity in 1931, was subject to a federal income tax.

II. The petition to review the determination of the Board of Tax Appeals came on for hearing before the Circuit Court of Appeals for the Second Circuit on April 8, 1936, before MANTON, L. HAND and CHASE, Cir. JJ., and was argued by counsel; and on July 13, 1936, an opinion was handed down, per CHASE, Cir. J., sustaining the determination of the Board of Tax Appeals and declaring your peti-

tioner's salary as Chief Engineer to the Bureau of Water Supply of the City of New York subject to federal income taxes. The opinion is reported in 85 F. (2d) 32.

III. Your petitioner submits that the decision below is in conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in *Hoskins* v. *Commissioner of Internal Revenue,* 84 F. (2d) 627 (1936), and with the decision of the United States Court of Appeals for the District of Columbia in *Halsey* v. *Helvering,* 75 F. (2d) 234 (1934), and that the conflict should be resolved by this Court at this time.

IV. Your petitioner avers that the Second Circuit's decision in the instant case will result in confusion and uncertainty as to the municipal and State agencies which may be taxed by the federal government and, correspondingly, which federal agencies may, likewise, be taxed by the several States.

V. Your petitioner avers that the supply of pure water to the City of New York, in adequate amounts, is a "usual governmental function", and that the claim of the federal government, upheld by the Court below, that it may subject your petitioner's salary to federal income taxes, amounts to an unwarranted and dangerous extension of the doctrine of *Helvering* v. *Powers,* 293 U. S. 214 (1934), and is otherwise contrary to law.

WHEREFORE, for reasons stated more fully in the annexed brief, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the

record and all proceedings of the said Circuit Court of Appeals for the Second Circuit in this cause, being No. 246 on its calendar for the October Term, 1935, to the end that the case may be reviewed and determined in this Court, as provided in Title 28, § 347 of the Code of Laws of the United States, and that the said final decree of the said Circuit Court of Appeals for the Second Circuit in this cause, and every part thereof, may be reviewed by this Court, and the determination of the said Circuit Court of Appeals for the Second Circuit, as well as the determination of the United States Board of Tax Appeals, which was affirmed by the said Circuit Court of Appeals for the Second Circuit, may be reversed and a mandate issued directing the redetermination of the amount of your petitioner's income taxes for the year 1931, as prayed for in your petitioner's petition to the said Board of Tax Appeals; and your petitioner prays for such other and further relief as to this Court shall seem just and proper; and your petitioner will ever pray.

Dated: New York, N. Y., October 8, 1936.

WILLIAM WHITLOCK BRUSH,
Petitioner.

BOYKIN C. WRIGHT,
CHARLES C. PARLIN,
Counsel for Petitioner,
63 Wall Street,
New York, N. Y.

Supreme Court of the United States

No. . October Term, 1936.

WILLIAM WHITLOCK BRUSH,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The City of New York is, with the exception of a negligible area, supplied with water from a system owned and operated by the Bureau of Water Supply. Private enterprise demonstrated its inadequacy to the task as far back as the year 1833. See N. Y. Laws 1833, ch. 36; N. Y. Laws 1834, ch. 256.

Steadily developing over a period of 100 years, the municipal water supply system now represents an outlay of $480,000,000 (R. 23), and is the result of special statutory powers of eminent domain exercised in counties far beyond the city limits.† No profit flows from the system's operations, the loss for the year 1933 being $7,000,000 (R. 33).

Water is, of course, supplied to the City itself (*e. g.*, for fire hydrants, sewage disposal, street cleaning purposes and public buildings) as well as to private consumers, and the Bureau's expenses are apportioned between public service and private service in the ratio of 25.2% and 74.8% (R. 21). But petitioner's entire salary was adjudged taxable.*

* We may suggest to the Court that there are many employees of the Bureau who give their entire time to the *public* service functions of the Bureau, *e. g.*, those who operate the high pressure water system used only to extinguish fires.

† See footnote next page

In asserting that the petitioner had no right to exclude his salary as such engineer from his taxable income for the year 1931, the Government wrote him as follows (R. 9):

> "It is held that the supplying of water by water plants to the residents of a community constitutes the discharge of a proprietary function as distinguished from an *essential* governmental function, consequently the compensation of the officers and employees of such plants is subject to Federal Income Tax." (Italics ours.)

As an employee (chief engineer) of the Bureau of Water Supply, the body charged with the operation of the system, the petitioner has duties which the Court below described as follows (R. 44-45):

> "During 1931, the petitioner was regularly employed, as he had been previously for many years, by the city of New York as the engineer in charge of its Bureau of Water Supply. This was a statutory office for which he had duly qualified. He was paid a fixed salary and was charged in general with the responsibility for supervising the maintenance of an adequate supply of pure and wholesome water for the city of New York and its inhabitants. The water for public and private use in that city for the most part, though not wholly, comes from an enormous system owned by the city which has cost about half a billion dollars and which must be still further enlarged to meet the ever growing demands upon it. Petitioner's duties require him to make surveys, plans and reports relative to improvements and enlargements of the system as well as to maintain in good condition the reservoirs, mains and equipment already possessed."

---

†This Court need not go beyond its own records for proof of this. See *New York City* v. *Pine*, 185 U. S. 93 (1902); *McGovern* v. *City of New York*, 229 U. S. 363 (1913); *New Jersey* v. *New York*, 283 U. S. 336 (1931).

We digress for a moment to point out that the salary of a taxpayer with practically identical duties was held exempt in *Halsey* v. *Helvering*, 75 F. (2d) 234 (U. S. Ct. of Appeals for the Dist. of Columbia, 1934). The Court's statement of the duties of the taxpayer (an engineer employed by two New Jersey towns) in the latter case illustrates the conflict between the two appellate Courts. They said (p. 235):

> "* * * the official duty of the taxpayer as township engineer was to advise the town government in all engineering matters, specifically including the construction, maintenance, and alteration of streets and ways, sewers, *waterworks*, and lighting systems; to prepare plans and specifications for such works; to advertise for bids; and to maintain custody of the plans, maps, and documents thereof, keeping them up to date by appropriate entries or new papers showing changes and alterations." (Italics ours.)

Opinion Below.

In delivering the opinion of the Circuit Court of Appeals, Judge CHASE, after summarizing the facts, and the arguments put forward by petitioner, and after acknowledging the magnitude of the undertaking, said (R. 46):

> "* * * but it is not equally clear that private enterprise adequately encouraged could not do it as well. To say that it could not in the light of common knowledge as to modern private achievement in business on a vast scale would seem to deny probability. In any event such an assertion is not adequately supported by evidence in this record."

He then went on to state that while water was indispensible to the inhabitants, the conduct of a municipal water supply

system is not "an activity necessary to its [the City's] existence as a government." He added (R. 47-48):

> "On the contrary, due regard must be had to distinguish between those activities which, though impressed with a public interest and sometimes, even often, performed by government are nevertheless done in a proprietary capacity in supplying to the public for a direct charge what it could, and otherwise would, procure from private sources and those services which have become the usual activities of government because purely governmental power is in some degree essential to their performance."

Questions Presented.

Upon the record as outlined above, the petitioner maintains that the following questions of law arise for the determination of this Court:

1. The supplying of water to Greater New York for use by the City itself and its inhabitants being an undertaking which cannot be either competently or safely left to private enterprise and having been conducted by the Government for over a century, should not the salary of a municipal employee serving as engineer to the Bureau of Water Supply be exempt from federal income taxes?

2. In order to receive immunity, must the activity of the municipality be "necessary to its existence as a government" (R. 47), or is it sufficient that the activity is "essential to the normal life of the community"? *Jamestown etc. Co.* v. *Commissioner,* 41 F. (2d) 920 (1st Circ., 1930), and other cases *post,* p. 15.

ARGUMENT.

1. The proper protection of municipalities from federal interference requires that "usual governmental function" be defined pragmatically. Excessive strictness of definition should be avoided. The supply of pure water to a metropolis is a "usual governmental function".

It will be recalled that in *Helvering* v. *Powers*, 293 U. S. 214, 225 (1934), the States were admonished that they could not

> "withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from *usual* governmental functions and to which, by reason of their nature, the federal taxing power would normally extend." (Italics ours.)

The substitution of "*usual* governmental functions" for the formerly prevalent phrase "*essential* governmental functions" is one of the most noteworthy features of the *Powers* case.* Yet the Court below seems to have overlooked the change, and to have confined the privilege of city employees against the federal taxation of their salaries to employees engaged in functions the suspension of which would suspend government itself. Governments in the world today must carry on activities which are outside of the meaning of the verb "to govern". Governments cannot rest content with the issuance of commands and prohibitions. They must in modern societies *purvey services*. Of

* The origin of the earlier phrase is traceable to *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172 (1911). It was devised to accentuate a distinction between "those operations of the States essential to the execution of its governmental functions, and which the State can only do itself, and those activities which are of a private character".

course we appreciate the wisdom of the rule in *South Carolina* v. *United States,* 199 U. S. 437 (1905), that States cannot withdraw unlimited areas from the field of federal taxation.

Now it is clear that it is "usual" for municipalities to operate their own waterworks. In the *Municipal Index and Atlas,* 1934-35 Edition, a list is given on pages 120-132 of political units (of 10,000 population) which are served by waterworks. Out of 969 separate waterworks 779 or 80.39% are municipally owned and operated, and only 190 or 19.61% are privately owned and operated. An examination of earlier editions of this reference work shows a steady rise in the percentage of municipally owned and operated waterworks. Unless we are to reject facts and wander along the by-paths of metaphysics and sophistry, the syllogism would seem complete, and the petitioner's right to tax exemption established.

To sanctify the dictum (for dictum it certainly was) in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 172 (1911), that it "is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like", and to regard the utterance as an immutable edict comparable to the laws of the Medes and the Persians, is to close one's eyes to the eternal processes of change and development that go on unceasingly in our political affairs. We know of no principle compelling a federal court to hold that, even if it be assumed that water supply was not generally regarded as a usual governmental function in 1911, that activity cannot become one by the gradual unfolding of civic history. On the contrary, in *Hoskins* v. *Commissioner of Internal Revenue,* 84 F. (2d) 627 (5th Circ., 1936), the Court took pains to point out that in considering whether a given activity (*i. e.,* running a

cafeteria in connection with a public school) was properly a governmental function and those engaged in it properly exempt from federal taxation, it should consider actualities and not be bound by views prevailing in times past.

Even before *Flint* v. *Stone Tracy Co., supra,* this Court had made pronouncement upon the subject of the duty of municipalities in reference to waterworks in *Columbus* v. *Mercantile Trust Co.,* 218 U. S. 645 (1910), saying (p. 658):

> "No higher police duty rests upon municipal authority than that of furnishing an ample supply of pure and wholesome water for public and domestic uses. The preservation of the health of the community is best obtained by the discharge of this duty, to say nothing of the preservation of property from fire, so constant an attendant upon crowded conditions of municipal life."

We submit that the legislature was both right and reasonable, in concluding in 1833 and in adhering to that view ever since, that supplying water to New York City was an act "which the State [or its political subdivisions] can only do for itself,"—the phrase used in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 172 (1911).

While the Court probably intended us to apply *a priori* tests to determine whether an activity might be so characterized, nevertheless we submit that the more obvious illustrations, which we cite in the margin,* may be supplemented by illustrations evolved from *a posteriori* or experiential tests as well. And we maintain that the case at bar presents a perfect *practical* instance of an activity "which the State can only do itself".

---

* The Governor of a State (or the Mayor of a City), the members of the legislature, the judiciary and the law-enforcing agencies, are by virtue of their functions clearly within the group envisaged in the quoted phrases.

The population of Greater New York, as shown by the 1930 census, was 6,930,446. In developing its water supply system, the City has already spent $480,000,000 (R. 23). This, as the Court well knows, has involved condemning for reservoirs and other instrumentalities related to water supply purposes areas of ground many square miles in extent, and situated far beyond the city limits. It is more than questionable whether private capital could have been assembled in sufficient quantities to carry on the needed construction operations. And since, as an incident to these operations, it has been made the City's express duty (L. 1905, ch. 724, § 35, as amended by L. 1928, ch. 525, § 5) to build and maintain highways and bridges in the vicinity of the reservoirs, and to give police protection to neighboring localities during the period of construction (*ibid.*), additional reasons are revealed for not trusting to private capital to carry out the enterprise.

The wide geographical areas exploited in connection with the maintenance of a supply adequate to the City's expanding needs may be discerned by reference to the following cases:

New York City v. *Pine,* 185 U. S. 93 (1902), Byram River, Westchester County;

McGovern v. *City of New York,* 229 U. S. 363 (1913), lands in Ulster County;

New Jersey v. *New York,* 283 U. S. 336 (1931), headwaters of Delaware River, Delaware, Sullivan, Orange and Rockland Counties;

People ex rel. Burhans v. *City of New York,* 198 N. Y. 439 (1910), lands in Ulster County;

Matter of Board of Water Supply, 211 N. Y. 174 (1914), lands in Ulster County;

Matter of Van Etten v. *City of New York,* 226 N. Y. 483 (1919), Esopus Creek, Ulster County;

Matter of Gillespie, 272 N. Y. 18 (1936), Esopus Creek, Ulster County;

Matter of City of New York (Mohansic Lake), 234 App. Div. 890 (2nd Dept., 1931), lands in Yorktown, Westchester County.

It was, therefore, quite reasonable for the legislature to determine, in its wisdom, that the City should not have to trust to the dubious efficacy of private capital but should be empowered to do the acts and complete the enterprise itself.

While the quoted phrase, "which the State can only do itself", presupposes a fairly absolute standard of possibility or impossibility, yet a legislative determination that an act can only be done by the State should, like any other "declaration by a legislature concerning public conditions that by necessity and duty it must know," *Block* v. *Hirsh,* 256 U. S. 135, 154 (1921), be respected by the Courts, until shown to be mistaken by a more impressive array of evidence than can be found in the record in the instant case.

We therefore submit that the Court below erred in cavalierly disregarding the findings of the State legislature and in concluding—recklessly concluding, we are tempted to say—that to deny the adequacy of private enterprise to this stupendous task is "to deny probability" (R. 46). On the contrary, the Court's conclusion itself is in utter disregard not only of probability but of actuality, and of a century of civic history.

2. A conflict among the circuits is plainly discernible.

The Court below stated in its opinion (R. 49):

> "The petitioner's work in furtherance of the supply of water by the city of New York as above outlined and for which he has been paid the salary taxed is not, in the light of the foregoing considerations, part

> of what his employer has to do to perform its *necessary* functions as a political subdivision of the state of New York. So the salary of the petitioner was not part of the expense attendant upon the exercise of what may be said to be *usual* governmental powers, Helvering v. Powers supra, or in the doing of what the states have *traditionally* engaged."

The Second Circuit's holding in the instant case limiting immunity to what is "necessary" for the City to do to maintain its existence as a political subdivision of the State, and the further emphasis upon tradition, are in sharp conflict with *Hoskins* v. *Commissioner of Internal Revenue, ante*, p. 10, where the Fifth Circuit took pains to point out that in the light of present day conditions, the running of a cafeteria in connection with a public school was *"now"* a proper governmental activity, entailing as a result the exemption from federal taxation of the salary of the superintendent of the cafeteria. There is also manifest a sharp contrast with *Jamestown & Newport Ferry Co.* v. *Commissioner of Internal Revenue*, 41 F. (2d) 920 (1st Circ., 1930), holding that the income of a ferry company, of which the town of Jamestown, R. I., held a majority of the stock, was exempt from federal income taxes on the ground, among others, that the ferry was "essential to the normal life of this community" (p. 923), a markedly broader and more liberal test than that of necessity to existence as a political subdivision, adopted by the Court below.

The decision is also in conflict with *Halsey* v. *Helvering, ante* p. 7, a case where the salary of a township engineer with duties practically identical with those of the petitioner was held exempt by the United States Court of Appeals for the District of Columbia.

3. The rule of decision adopted by the Court below will create confusion as to the legal limits of the taxing power of the Federal Government and of the States.

The logic of the Second Circuit's decision limiting, as it does, immunity from taxation to functions "necessary" to existence as a governmental body must inevitably lead to the conclusion that the Federal Government can tax the total income received by a municipality from its supply of water, and income derived by the State or its subdivisions from canals, waterways, parks, etc.

The decision would seem to lead, correlatively, to a wide extension of the powers of the State to tax federal agencies, including among others, the Tennessee Valley Authority.

Conclusion.

We submit that the case merits the attention of this Court because the status for federal tax purposes of municipal water supply employees has not yet been passed upon by this Court; because the problem, raised by one type or another of public servant, has given rise to sharp conflicts among the Circuit Courts of Appeals; because it is but a short step from taxing this petitioner to taxing the municipal enterprise itself; because (in cities of over 10,000 population) there are 779 municipally owned waterworks in the country whose employees, numbered by the thousands, are affected by the decision below; and because federal interference with their relations impinges upon vital points in city government, *i. e.*, the provision of adequate protection against fire hazards, and of adequate means for sewage disposal and the cleaning of the streets.

The Petition for Certiorari Should be Granted.

October 8, 1936.

Respectfully submitted,

BOYKIN C. WRIGHT,
CHARLES C. PARLIN,
Counsel for Petitioner,
63 Wall Street,
New York, N. Y.

Office - Supreme Court, U. S
FILED
JAN 8 1937
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1936—No. 451

WILLIAM WHITLOCK BRUSH,
Petitioner,

against

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

PETITIONER'S BRIEF.

January 6, 1937.

BOYKIN C. WRIGHT,
CHARLES C. PARLIN,
Counsel for Petitioner,
63 Wall Street,
New York, N. Y.

(24973) LAWYERS PRESS, INC., 165 WILLIAM STREET, NEW YORK CITY, N. Y. 913

INDEX

	PAGE
Preliminary Statement	1
Jurisdiction	1
Question Presented	2
Statute and Regulations Involved	2
Facts	4
Argument	8
I. The supply of pure water, in adequate amounts, to urban centers of population is a usual governmental function. It has been so traditionally, and a marked tendency is presently discernible in municipal administration to shift from private to public ownership of waterworks, thus accentuating the tradition	9
1. The test to be applied is whether the supply of water is a "usual governmental function"	9
2. That it has been consistently regarded as a sovereign or governmental function from an early date is clear under the authorities	11
3. The necessity of public operation of waterworks is so widely recognized that such operation has become usual, with private operation rare in practice and confined to the smaller cities	13
4. In defining "usual governmental function", the Courts should not confine their attention to the situation prevailing when the Union was formed	14

PAGE

5. The analogy of the tort cases is impertinent and misleading 15

6. The petitioner's contentions do not lead to a withdrawal of any field from federal taxation. The field we are concerned with has never previously been invaded by the federal government 16

7. That revenues are derived from the municipal waterworks is of no consequence 17

II. The taxation of the petitioner's salary impedes and burdens the municipality in performing governmental functions 18

Conclusion 20

TABLE OF CASES

Ashton v. Cameron County Water Imp. Dist., 298 U. S. 513 12

Canavan v. City of Mechanicville, 229 N. Y. 473 15
City of Rochester v. Town of Rush, 80 N. Y. 302 12
Collector v. Day, 11 Wall. 113 19
Columbus v. Mercantile Trust Co., 218 U. S. 645 ..... 11, 15
Commissioner of Internal Revenue v. Ten Eyck, 76 F. (2d) 515 17

Flint v. Stone Tracy Co., 220 U. S. 107 10

Helvering v. Powers, 293 U. S. 214 ..... 9, 10, 16
Hoskins v. Commissioner of Internal Revenue, 84 F. (2d) 267 15

Leonard v. City of Brooklyn, 71 N. Y. 498 13

PAGE

Matter of Village of Massena v. St. Lawrence Water Co., 126 N. Y. Misc. 524, 214 N. Y. Supp. 113 13
McCulloch v. Maryland, 4 Wheat. 316 19
Metcalf & Eddy v. Mitchell, 269 U. S. 514 ..... 17, 19
Miller v. McCaughn, 27 F. (2d) 128 19

New Orleans v. Morris, 105 U. S. 600 11
New Orleans Water Works Co. v. Rivers, 115 U. S. 674 11
New York ex rel. Rogers v. Graves, 299 U. S. 18, 19
Northrup v. City of Jackson, 273 Mich. 20, 262 N. W. 641 16

Oakes Mfg. Co. v. City of New York, 206 N. Y. 221 15
Ohio v. Helvering, 292 U. S. 360 ..... 12, 18

Selective Draft Law Cases, 245 U. S. 366 19
South Carolina v. United States, 199 U. S. 437 12

Trenton v. New Jersey, 262 U. S. 182 16

United States v. California, 297 U. S. 175 10
United States v. Coghlan, 261 Fed. 425 18

Supreme Court of the United States

October Term, 1936—No. 451

WILLIAM WHITLOCK BRUSH,
Petitioner,
against
GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

PETITIONER'S BRIEF.

Preliminary Statement.

A deficiency assessment on account of the tax upon his income for the year 1931 having been made against the petitioner, he appealed to the Board of Tax Appeals to secure a redetermination of the matter. He assigned as error the failure of respondent to accord exemption to so much of his income as represented salary paid him for services as Chief Engineer of the Board of Water Supply of the City of New York. The Commissioner having been upheld by the Board in an opinion by Mr. LEECH (R. 14-17), the petitioner appealed to the Circuit Court of Appeals for the Second Circuit. That Court affirmed, in an opinion *per* CHASE, J. (R. 43-49; 85 F. [2d] 32).

Jurisdiction.

This Court on November 16, 1936, granted a petition for a writ of certiorari, which had been applied for pursuant to Judicial Code § 240 (a) (U. S. C. Tit. 28, § 347).

Question Presented.

The supplying of water to Greater New York for use by the City itself and its inhabitants being a usual governmental function and an undertaking which cannot be either competently or safely left to private enterprise and having been conducted by the Government for over a century, should not the salary of a municipal employee serving as engineer to the Department of Water Supply be exempt from federal income taxes? The Petitioner contends that the Court below adopted an erroneous criterion for immunity, in that the Court laid down the test that the activity in question must be "necessary to its [the municipality's] existence as a government" (R. 47).

Statute and Regulations Involved.

Section 22 of the Revenue Act of 1928 (45 Stat. 791, 797), under the alleged authority of which the respondent acted in imposing the challenged tax, defines gross income as follows:

> "'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

Purporting to act pursuant to the statute referred to, the Bureau of Internal Revenue promulgated Regulations 74, Art. 643, reading as follows:

> "Art. 643. **Compensation of State officers and employees.**—Compensation paid to its officers and

employees by a State or political subdivision thereof for services rendered in connection with the exercise of an essential governmental function of the State or political subdivision, including fees received by notaries public commissioned by States, is not taxable. Compensation received for services rendered to a State or political subdivision thereof is included in gross income unless (*a*) the person receives such compensation as an officer or employee of a State or political subdivision, and (*b*) the services are rendered in connection with the exercise of an essential governmental function. The commissions of receivers appointed by State courts are subject to tax for 1928 and subsequent taxable years.

An officer is a person who occupies a position in the service of the State or political subdivision, the tenure of which is continuous and not temporary and the duties of which are established by law or regulations and not by agreement. An employee is one whose duties consist in the rendition of prescribed services and not the accomplishment of specific objects, and whose services are continuous, not occasional or temporary. Employees of universities receiving salaries paid in part or in whole from funds available under the Smith-Lever Act of May 8, 1914, who are officers or employees of a State, are not required to return as taxable income the salaries so received. This is also true with respect to the Act of August 30, 1890, relating to colleges for the benefit of agriculture and the mechanic arts, and to the Act of March 2, 1887, relating to agricultural experiment stations in such colleges. As to State contracts, see article 56."

The Government, in its communication to the petitioner, drew the following conclusions from Article 643 (R. 9):

"It is held that the supplying of water by water plants to the residents of a community constitutes the discharge of a proprietary function as distinguished from an essential governmental function, consequently the compensation of the officers and employees of such plants is subject to Federal Income Tax."

Facts.

The petition to the Board of Tax Appeals, which the petitioner duly filed, alleged as the reason for a determination in his favor *inter alia,* that (R. 5):

> "(b) The petitioner during the year 1931 as an officer of the City of New York, had supervision over the engineering details connected with the supplying of water to the City of New York for public purposes and the supplying of water to consumers thereof residing in the City of New York."

The answer denied this allegation (R. 13).

At the hearing before Mr. Leech of the Board of Tax Appeals, the Government admitted (R. 20):

> "The sole question before the Board is whether the supplying of water to the City of New York is a governmental function, * * *."

Mr. Brush took the stand in his own behalf and, after testifying to his appointment as Chief Engineer of Water Supply in the Department of Water Supply, Gas and Electricity of the City of New York, said that the Department's expenses were allocated two ways, *i. e.,* to the public service, and to the service of furnishing water to private consumers. He said (R. 21):

> "Of the expenses of the Department in 1931, 25.2% were allocated to public service, *i. e.,* service other than furnishing water to private consumers. The figure 25.2% was divided as follows: 11.8% to fire protection service; 6% to street cleaning and street flushing service; 5% to furnishing water for public buildings and public use without charge; .2% to the supervision of private water companies; 2.2% to the furnishing of water to communities other than the City of New York. Water is furnished to outside communities pursuant to statutes which specifically prescribe the charge that the City may make to such

other municipality. This charge is limited to the actual cost of collecting and delivering the water outside of the City."

He listed the following among his duties (R. 21-22)*:

1. the protection of the water supply from pollution;

2. the destruction of polluting matter that might have entered;

3. the determination of the amount of water to be drawn from various sources;

4. operations—including storage, transportation, distribution, treatment, delivery, maintenance of pressure, and control of use;

5. the maintenance of the high pressure fire service systems;

6. the supervision of personnel and expenditures;

7. the preparation of plans for improvements and extensions;

8. the preparation of agreements with outside communities for the supply of water from City sources, under special statutes, and the supervision of deliveries under such agreements, and of collections of charges agreed upon.

As to the financial operations of the Department of Water Supply, Mr. Brush stated that its revenues were turned over to the General Tax Fund of the City, whereas its expenses (including Mr. Brush's salary) were met from moneys raised by budget and tax levies (R. 22-23). He added (R. 27):

"The salary paid to me is in connection with my services rendered for all the boroughs constituting the Greater City of New York. There is no direct contribution by the other boroughs to the operation of the Water Supply System, that is, none of the

* See Greater New York Charter, §§ 468 *et seq.*

revennes derived from the sale of water is used as such for the maintenance or operation thereof."

Mr. Brush pointed out that the City's water supply system had already cost $480,000,000 (R. 23). This and related testimony was put in (R. 23-24)

> "to show that the furnishing of water to the City of New York involves projects of such magnitude and problems of such scope that it would be well nigh impossible for any private company to undertake them, and our point is that the City of New York in engaging in the furnishing of water, was engaging in an undertaking which it was compelled to engage in, because of the utter impossibility of securing future water supply for a city of this size, and in view of the problems which the City has to face through any private company.
>
> The Member: That is to say it is your position that the furnishing of water to a city the size of New York is a proposition of such magnitude, financially and otherwise, that it is necessarily a governmental function because it could not be done by private individuals?
>
> Mr. Weiner: That is one phase of it, yes, your Honor."

The method of figuring out what private consumers should pay the City for water was outlined at R. 27-28. Operations were shown to have been carried on at large annual losses ($7,000,000 in 1933 [R. 33]).

Mr. Brush stressed the connection between water supply and sewage disposal, and said (R. 32):

> "In my judgment as an Engineer there is very close relation between water supply and sewage disposal. The amount of water to be disposed of as sewage is almost exactly the amount of water which is furnished by the water supply for the community less the amount that is used for irrigation and simi-

lar purposes which does not reach the sewer. There is also a relation between the disposition of sewage and the sources of water supply. The question of how the sewage is disposed of has very vital effect on the question of the potability or purity of the water supply and its suitability for human consumption."

In addition to the foregoing facts, it should be remarked that the legislature has conferred upon the City of New York (N. Y. Laws 1905, ch. 724, § 35, as amended by L. 1928, ch. 525, § 5), as an incident of its power to construct and operate an aqueduct system, the duty to build and maintain highways and bridges in the vicinity of the reservoirs, and to give police protection to neighboring localities during the period of construction.

Opinions Below.

(1)

Mr. LEECH, writing for the Board of Tax Appeals, held (R. 16-17) that the petitioner had failed to establish his right to immunity because (1) in the operation of a water system a municipality is acting in its corporate or proprietary character and not in a governmental capacity, and (2) the magnitude of the undertaking of supplying water to the inhabitants of New York City was not a feasible basis for distinguishing the instant case from the general rule.

(2)

In delivering the opinion of the Circuit Court of Appeals, Judge CHASE, after summarizing the facts and the arguments put forward by petitioner, and after acknowledging the magnitude of the undertaking, said (R. 46):

"* * * but it is not equally clear that private enterprise adequately encouraged could not do it as well.

> To say that it could not in the light of common knowledge as to modern private achievement in business on a vast scale would seem to deny probability. In any event such an assertion is not adequately supported by evidence in this record."

He then went on to state that while water was indispensible to the inhabitants, the conduct of a municipal water supply system is not "an activity necessary to its [the City's] existence as a government". He added (R. 47-48):

> "On the contrary, due regard must be had to distinguish between those activities which, though impressed with a public interest and sometimes, even often, performed by government are nevertheless done in a proprietary capacity in supplying to the public for a direct charge what it could, and otherwise would, procure from private sources and those services which have become the usual activities of government because purely governmental power is in some degree essential to their performance."

Outline of Argument.

Upon the record as outlined above we propose to argue as follows:

1. The supply of pure water, in adequate amounts, to urban centers of population is a usual governmental function. It has been so traditionally, and a marked tendency is presently discernible in municipal administration to shift from private to public ownership of waterworks, thus accentuating the tradition.

2. The taxation of the petitioner's salary impedes and burdens the municipality in performing governmental functions.

POINT I.

The supply of pure water, in adequate amounts, to urban centers of population is a usual governmental function. It has been so traditionally, and a marked tendency is presently discernible in municipal administration to shift from private to public ownership of waterworks, thus accentuating the tradition.

1. The test to be applied is whether the supply of water is a "usual governmental function".

It will be recalled that in *Helvering* v. *Powers*, 293 U. S. 214 (1934), this Court held the salary of one of the trustees of the Boston Elevated Railway Company, to be subject to federal income taxes, although he was appointed by the Governor under a special act of the Commonwealth which provided for the operation of the company under an arrangement whereby deficiencies in its income were to be made good by the Commonwealth for a limited period. The claim to exemption was tenuous in the extreme for the Company paid the salary, and the case is remote from the instant case on its facts. It possesses importance, however, by reason of the admonition to the States (p. 225) that they cannot

> "withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from *usual* governmental functions and to which, by reason of their nature, the federal taxing power would normally extend." (Italics ours.)

And of the Treasury Regulations under which the imposition of the tax was justified, the Court said (p. 224):

> "The Treasury Regulations, manifestly in an effort to interpret and apply that limitation, provide for

> exemption from taxation of compensation paid by a State or political subdivision to its officers and employees only in case their services are rendered 'in connection with the exercise of an *essential* governmental function'. Treas. Reg. No. 69, Art. 88; No. 74, Art. 643; No. 77, Art. 643. But the Treasury Department could not by its regulation either limit the provisions of the statute or define the boundaries of their constitutional application." (Italics ours.)

The rejection of "essential" as a test is thus manifest, as well as the intent to formulate a new criterion of immunity, and to effect a supersession of the tests formerly prevailing. For in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (1911), this Court had differentiated between "those operations of the States *essential* to the execution of its governmental functions, and which the State can only do itself, and those activities which are of a private character".

The substitution thus made of "*usual* governmental functions" for the formerly prevalent phrase "*essential* governmental functions" seems to us one of the most noteworthy features of the *Powers* case; so that it is surprising that the Court below overlooked the change and deemed it its duty to confine the immunity of city employees against the federal taxation of their salaries to employees engaged in functions the suspension of which would suspend government itself.

The change from "essential" to "usual" was not merely an unintentional change in verbiage, as the Solicitor General would have us believe (Brief in opposition to petition for certiorari, p. 11); for this Court reiterated in substance the *Powers* formula in *United States* v. *California*, 297 U. S. 175 (1936), saying (p. 185):

> "Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power."

2. That it has been consistently regarded as a sovereign or governmental function from an early date is clear under the authorities.

The cases clearly show that the operation of a waterworks is a true governmental function, and that this attitude on the part of the Courts has been adhered to with rare consistency.

An early case is *New Orleans* v. *Morris*, 105 U. S. 600 (1882), in which the lower Court had held unconstitutional, under the obligation of contracts clause, a statute exempting from execution the stock of its waterworks owned by the City. This Court reversed and found an adequate justification for the statute in public policy, stating (p. 602):

> "• • • we think it quite clear that these works were of a character which, like the wharves owned by the city, were of such public utility and necessity, that they were held in trust for the use of the citizens. In this respect they were the same as public parks and buildings, and were not liable to sale under execution for ordinary debts against the city."

Similar expressions will be found in *New Orleans Waterworks Company* v. *Rivers*, 115 U. S. 674, 681-682 (1885).

In *Columbus* v. *Mercantile Trust Co.*, 218 U. S. 645 (1910), the Court exalted water supply to the rank of one of the highest police duties entrusted to a city, saying (p. 658):

> "No higher police duty rests upon municipal authority than that of furnishing an ample supply of pure and wholesome water for public and domestic uses. The preservation of the health of the community is best obtained by the discharge of this duty, to say nothing of the preservation of property from fire, so constant an attendant upon crowded conditions of municipal life."

This Court's description of water supply as the highest of police duties is of great significance for our present purposes. For it allows us to distinguish readily such cases as *South Carolina* v. *United States*, 199 U. S. 437 (1905), and *Ohio* v. *Helvering*, 292 U. S. 360 (1934). In the latter case this Court said (p. 369):

> "If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned."

But in the instant case, the municipality is, by definition, not entering the market place seeking customers but is performing activities for which authority need not be sought apart from the police power, for those activities are the *highest* of police duties.

More recently, this Court in *Ashton* v. *Cameron County Water Improvement District*, 298 U. S. 513 (1936), after stating that the respondent was organized to furnish water for domestic and irrigation uses, said (pp. 527-528):

> "It is plain enough that respondent is a political subdivision of the State, created for the local exercise of her sovereign powers, and that the right to borrow money is essential to its operations."

The New York cases are in harmony with the foregoing. Thus in *City of Rochester* v. *Town of Rush*, 80 N. Y. 302 (1880), the plaintiff-respondent sought to have those parts of its waterworks located in the defendant town declared

exempt from taxation. Relief was denied because the plaintiff had not proceeded under the right statute, but the Court pointed out (p. 307) that the waterworks project had been "executed for the public good, and the property therefore held for public purposes". It consequently could not be seized in the foreclosure of a lien for taxes or otherwise. And after citing a case holding a bell-tower exempt from execution in mechanic's lien proceedings (*Leonard* v. *Brooklyn*, 71 N. Y. 498 [1877]), this Court said (p. 308):

> "A bell-tower, from which the alarm of fire may be sounded, cannot be considered more necessary in the scheme of municipal affairs and good government than water-works, which will furnish the means of extinguishing the fire when its existence is announced."

See also *Matter of Village of Massena* v. *St. Lawrence Water Co.*, 126 N. Y. Misc. 524, 214 N. Y. Supp. 113 (Sup. Ct., 1926), where the Court said (pp. 529-530):

> "The furnishing of a supply of water not only as a precaution against fire and sanitary purposes but also for individual use has always been recognized as a proper public and municipal purpose based upon the inherent and palpable necessity of the case and customs of thickly-settled communities. A municipality exercises this power in its legislative and governmental capacity."

3. The necessity of public operation of waterworks is so widely recognized that such operation has become usual, with private operation rare in practice and confined to the smaller cities.

Public operation of waterworks in the large cities has, as time goes on, been more and more widely recognized as necessary. The calamitous consequences of a failure of the

water supply have converted cities to public operation because the immediacy of control which it gives reduces the chances of stoppage. Moreover, the time consumed in the construction of waterworks, especially when the sources to be tapped are remote, makes it always speculative whether a privately organized company can keep itself in a sound financial state while waiting for earnings to begin. There is also the risk that the eagerness of private companies to show profits might well make them postpone programs of expansion until forced into adopting them by the occurrence of some public catastrophe.

The wide acceptance of these doctrines as directing forces in shaping municipal policy is shown by the statistical charts in the *Municipal Index and Atlas.* In its 1934-35 edition, a list is given on pages 120-132 of political units (of 10,000 population) which are served by waterworks. Out of 969 separate waterworks 779 or 80.39% are municipally owned and operated, and only 190 or 19.61% are privately owned and operated. An examination of earlier editions of this reference work shows a steady rise in the percentage of municipally owned and operated waterworks.

Further statistics in the brief filed by the Corporation Counsel of the City of New York as *Amicus Curiae* show that it is practically an invariable thing for every city, upon reaching the 100,000 class, to shift from private to public ownership of waterworks.

4. In defining "usual governmental function", the Courts should not confine their attention to the situation prevailing when the Union was formed.

Nor have the Courts been averse to recognizing the duty to look at current developments, and to expand the concept "usual governmental function" accordingly.

Thus in *Hoskins* v. *Commissioner of Internal Revenue*, 84 F. (2d) 627 (5th Circ., 1936), the Court took pains to point out that in considering whether a given activity (*i. e.*, running a cafeteria in connection with a public school) was properly a governmental function and those engaged in it properly exempt from federal taxation, it should consider actualities and not be bound by views prevailing in times past.

5. The analogy of the tort cases is impertinent and misleading.

We are well aware that the conduct of waterworks has been held in New York to be an activity carried on by cities in their private or proprietary, rather than in their governmental capacity. *Oakes Manufacturing Co.* v. *City of New York*, 206 N. Y. 221 (1912); *Canavan* v. *City of Mechanicville*, 229 N. Y. 473 (1920). But these decisions were both tort cases, where considerations of policy are widely different from those pertinent to the case at bar. Exemption from liability in tort might have led to widespread individual suffering and other consequences of a deplorable character. The Courts might well have decided that to leave uncompensated all persons injured through the negligent operation of waterworks would produce more widespread social evils than would flow from holding cities liable to persons injured.

Radically different considerations assume control when the discussion shifts to the matter of tax exemption of waterworks' employees from federal taxes. To deny exemption hinders the performance of what this Court regarded as the highest of police duties (*Columbus* v. *Mercantile Trust Co., supra*) by either leaving employees dissatisfied with reduced salaries or cities burdened with the duty of increasing those salaries to levels adequate to

leave a fair and just net salary after paying taxes. Consequently, the analogy of the tort cases should not mislead the Court.

That their traditional dichotomy is not universally valid has been acknowledged by this Court itself. In *Trenton* v. *New Jersey*, 262 U. S. 182 (1923), wherein the plaintiff in error argued that property owned in its private or proprietary capacity could not be summarily taken from it by legislative act without violating the Fourteenth Amendment whatever might be the rule as to property owned in its sovereign or governmental capacity, the Court said (pp. 191-192):

> "The basis of the distinction is difficult to state,* and there is no established rule for the determination of what belongs to the one or the other class. It originated with the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations. But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the City of Trenton against the State of New Jersey. They do not apply as against the State in favor of its own municipalities."

6. The petitioner's contentions do not lead to a withdrawal of any field from federal taxation. The field we are concerned with has never previously been invaded by the federal government.

The cautionary language of the *Powers* case that the States cannot withdraw sources of federal revenue by engaging in businesses usually carried on by private citizens,

---

* It was stigmatized as "largely a matter of legal acrobatics" in *Northrup* v. *City of Jackson*, 273 Mich. 20, 24, 262 N. W. 641 (1935).

has no pertinence here. The salaries of water supply employees have *never* been held taxable by this Court, and no immunity is now claimed which has not been tacitly recognized for a century.

It is interesting to note that immunity was expressly recognized as late as 1925, the date of the argument in *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514 (1926). The case was here on cross writs of error. Of the Collector's writ, this Court said (p. 519):

> "The court found that the two items of income involved in No. 376 were received by one of the plaintiffs in error as compensation for his services as the incumbent of an office created by statute; in one case as chief engineer of the Kennebec Water District, a political subdivision of the State of Maine, and in the other as a member of the Board of Engineers of the North Shore Sanitary District, a political subdivision of the State of Illinois. The Collector does not press his writ of error in this case, and we therefore dismiss the writ."

7. That revenues are derived from the municipal waterworks is of no consequence.

It is hardly necessary to add that while the water supply enterprises of New York City produce some revenue (though without a net profit), that circumstance does not defeat the right to immunity from federal taxation which the petitioner now claims.

In *Commissioner of Internal Revenue* v. *Ten Eyck,* 76 F. (2d) 515 (2nd Circ., 1935), where the salary of the Chairman of the Albany Port District Commission was held exempt from federal taxation, the Court said (p. 519):

> "It is the entrance into a trade enterprise that distinguishes these cases, relied upon by the petitioner. It cannot be maintained that there is involved in the instant case a trade or business, entered

the contention to that effect is refuted by its mere statement."

We venture to suggest that the position taken by the respondent in the case at bar is not without perils to the federal government itself. For if the government's contentions are upheld, the various states in which the Tennessee Valley Authority carries on its operations might well seek to tax its revenues and its real estate, on the ground that to do so would not impede any activity essential to the existence of the federal government *as a government.* Such an extension of the power of the States to tax federal agencies would appear to be sanctioned by the logic of the decision we are so earnestly asking this Court to reverse.

Conclusion.

The order of the Circuit Court of Appeals should be reversed, and the cause remanded to the Board of Tax Appeals with directions to redetermine the petitioner's income tax for the year 1931 pursuant to the prayer of the petition heretofore filed with the Board.

Dated, New York, N. Y., January 6, 1937.

Respectfully submitted,

BOYKIN C. WRIGHT,
CHARLES C. PARLIN,
Counsel for Petitioner,
63 Wall Street,
New York, N. Y.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	3
Argument	5
Conclusion	11

CITATIONS

Cases:

Blair v. *Byers*, 35 F. (2d) 326	7
Canavan v. *City of Mechanicville*, 229 N. Y. 473	10
Columbus v. *Mercantile Trust Co.*, 218 U. S. 645	9
Denman v. *Commissioner*, 73 F. (2d) 193	6, 7
Flint v. *Stone Tracy Co.*, 220 U. S. 107	6, 11
Halsey v. *Helvering*, 75 F. (2d) 234	7
Helvering v. *Powers*, 293 U. S. 214	5, 11
Hoskins v. *Commissioner*, 84 F. (2d) 627	
Jamestown & Newport Ferry Co., v. *Commissioner*, 41 F. (2d) 920	8
Matter of Water Comrs. of White Plains, 176 N. Y. 239	10
Oakes Mfg. Co. v. *City of New York*, 206 N. Y. 221	10
South Carolina v. *United States*, 199 U. S. 437	11
United States v. *California*, 297 U. S. 175	5

Statute:

Revenue Act of 1928, c. 852, 45 Stat. 791:	
Sec. 22	2

Miscellaneous:

Treasury Regulations No. 74:	
Art. 643	2

103574—36

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 451

WILLIAM WHITLOCK BRUSH, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 14–17) is not reported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 43–49) is reported in 85 F. (2d) 32.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 20, 1936 (R. 50). The petition

for a writ of certiorari was filed October 9, 1936. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the salary received by the petitioner as chief engineer of the Bureau of Water Supply of the City of New York constitutes income taxable by the United States Government.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, * * *.

Treasury Regulations No. 74:

> ART. 643. *Compensation of State officers and employees.*—Compensation paid to its officers and employees by a State or political subdivision thereof for services rendered in connection with the exercise of an essential governmental function of the State or political subdivision, including fees received by notaries public commissioned by States, is not taxable. Compensation received for services rendered to a State or political subdivision thereof is included in gross income unless (*a*) the person receives such compensation as an officer or employee of a State or political subdivision, and (*b*) the

services are rendered in connection with the exercise of an essential governmental function. The commissions of receivers appointed by State courts are subject to tax for 1928 and subsequent taxable years.

STATEMENT

The material facts, as found by the Board of Tax Appeals (R. 14–17), are set forth below:

The petitioner during the calendar year 1931 was employed as chief engineer of the Bureau of Water Supply of the City of New York. He has been so employed for thirty-six years. This is a statutory office. His duties as chief engineer included the protection of the water supply of New York City from pollution, the determination of the amount of water to be withdrawn from various sources, the operation of the municipal water system, supervision of personnel, all matters connected with the expenditure of moneys allocated for water supply purposes, and the preparation of plans, surveys, and reports on improvements and installations of the water supply system. (R. 14–15.)

In the early days of New York City, water was furnished its citizens by private companies. In certain areas, water is furnished and sold by private companies at the present time. The present water-supply system of New York has been built up through the years by the construction of facilities by the city and the acquisition from time to time of private companies supplying certain areas (R. 15).

Water furnished by the city for business use is metered and the amount used is charged at a fixed rate. Water for private use is furnished on a flat annual sum basis, which is determined in accordance with the conditions that exist with respect to the particular residence served. Approximately 75% of the cost of maintaining and operating the water system of New York City is attributable to the furnishing of water for business and private use; approximately 25% is attributable to fire protection, street sprinkling and flushing, sewer flushing, supervision of private companies, and the supplying of water to communities outside of New York City (R. 15).

The municipal water system of New York City has entailed an enormous expense. The cost of the facilities for bringing water from the Catskills involved an expenditure of more than two hundred million dollars. A plan for additional water supply now under consideration contemplates an expenditure of two hundred and twenty-five million dollars. The sources of water supply of the several private companies now serving some of the outlying sections of the city are nearing a condition of exhaustion (R. 15–16).

The Board of Tax Appeals concluded (R. 17) that the salary received by the petitioner as chief engineer of the Bureau of Water Supply of the City of New York was taxable income, and the court below affirmed the decision (R. 50).

ARGUMENT

The petitioner seeks exemption from Federal income tax of his salary as chief engineer of the Bureau of Water Supply off the City of New York. The court below held (R. 49) that the task of supplying water did not come within the "usual governmental powers" contemplated by this Court in *Helvering* v. *Powers,* 293 U. S. 214, nor did it meet the "traditional" test referred to in *United States* v. *California,* 297 U. S. 175, 184. It concluded that (R. 47) the case "falls within the realm of necessary accommodation" so essential under our dual system of government, and that the petitioner's salary was not immune from taxation. We submit that the decision below is clearly correct.

The ultimate inquiry in every case of this type is whether the particular activity undertaken by the State or its political subdivision is in the exercise of its strictly and essentially governmental powers or functions. That question requires consideration not only of the nature of the activity, but also of the fundamental reason underlying the adoption of immunity. *Helvering* v. *Powers, supra,* pp. 224-225. The activity may be for a worthy public purpose or for the convenience and welfare of the people, but it is not for that reason governmental. *Helvering* v. *Powers, supra,* p. 225.

The court below, after a full consideration of petitioner's contentions, reached the conclusion that the city of New York was engaged in a business activity in the operation of its water system.

The decision below is in full accord with *Denman* v. *Commissioner,* 73 F. (2d) 193 (C. C. A. 8th), and with the principles enunciated by this Court in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, to the effect that (p. 172):

> It is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water, and the like. These objects are often accomplished through the medium of private corporations, and, though the public may derive a benefit from such operations, the companies carrying on such enterprises are, nevertheless, private companies, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred.
>
> The true distinction is between the attempted taxation of those operations of the States essential to the execution of its governmental functions, and which the State can only do itself, and those activities which are of a private character. The former, the United States may not interfere with by taxing the agencies of the State in carrying out its purposes; the latter, although regulated by the State, and exercising delegated authority, such as the right of eminent domain, are not removed from the field of legitimate Federal taxation.

In *Denman* v. *Commissioner, supra,* the court held that the salary of the manager of the waterworks system owned and operated by the City of Des Moines, Iowa, was not exempt from Federal income tax, since the operation of the waterworks was not the exercise of a governmental function, though about 40% of the water was used by the city. See also, to the same effect, *Blair* v. *Byers,* 35 F. (2d) 326 (C. C. A. 8th).

There is no authority to the contrary. The cases cited by the petitioner, discussed below, deal with different types of governmental functions and furnish the petitioner no support.

Halsey v. *Helvering,* 75 F. (2d) 234 (App. D. C.), is not, as the petitioner asserts (Pet. 7, 14), in conflict with *Denman* v. *Commissioner, supra,* and is not opposed to our contention. There, the taxpayer was the city engineer of two New Jersey municipalities, and his duties consisted of advising the municipalities on all engineering matters, which included specifically construction, maintenance, and alteration of streets and ways, sewers, waterworks, and lighting systems; the preparation of plans and specifications and maintaining custody of the same. While advice and preparation of plans in connection with waterworks were among his duties, the taxpayer's employment was in connection with all engineering matters of the towns and his services were rendered only in furnishing the town authorities with information

upon which they could act. His services were not rendered solely in operating or carrying on a private business venture, the waterworks system. In the instant case, the petitioner was employed solely in the operation of the waterworks system, which, we submit, is an enterprise or business private in character.

Nor does the case of *Hoskins* v. *Commissioner,* 84 F. (2d) 627 (C. C. A. 5th), relied upon by the petitioner (Pet. 10, 14) furnish any support. We submit that the Circuit Court of Appeals in deciding that case had no intention of laying down a new test for granting the immunity. The gist of that decision is the conclusion that the cafeteria under consideration was so interlinked with the administration of the public school system, which is a generally recognized governmental function, that the immunity should be granted to it as an integral part of that governmental function.

Jamestown & Newport Ferry Co. v. *Commissioner,* 41 F. (2d) 920 (C. C. A. 1st), relied upon by the petitioner (Pet. 14) did not involve the present issue of the taxability of the income of an employee of the instrumentality, but dealt solely with the taxability of the income of the instrumentality itself. The special statutory exemption from tax of income from public utilities operated by municipalities, which is not here involved, was there controlling. Though it was pointed out (p. 923) that the particular ferry was "essential to the normal life of this community", there was no intent in that

case to lay down a new test for tax exemption. Items such as food and fuel are likewise essential to the normal life of a community, and yet the furnishing of these items is clearly outside the scope of the contemplated immunity. In using the phraseology above quoted, the court was merely buttressing its conclusion that the ferry was in effect a public utility operated by the municipality within the meaning of the pertinent statute.

The language quoted by the petitioner (Pet. 11) from *Columbus* v. *Merchantile Trust Co.*, 218 U. S. 645, 658, considered in the light of the question there involved, can not, we submit, be construed as denying the principle established in the cases relied upon by the court below. That case involved merely the right of the city to construct and operate a waterworks system, when the private corporation to which it had granted a franchise to supply water failed to perform according to the contract, without being required to purchase the company's plant. It was in that connection that the quoted language was used. It can not, we submit, be interpreted to mean that where a city operates its own waterworks system it does so by virtue of its police or governmental power. It may well be within the police duties of the city to regulate and supervise the supply of water, but it certainly is no part of its duty as a sovereign governing its people to, itself, undertake the business of supplying water to the people. We do not here question the right of a municipality to furnish

water to its citizens, but it does not follow that, because a specified task falls within the authorized scope of municipal activities, such a task is to be regarded as such an essential governmental function as to entitle the employees engaged thereon to immunity from Federal income taxation.

While not controlling for Federal tax purposes, decisions of the New York courts dealing with liability of municipalities of that State engaged in operating waterworks provide us with a persuasive analogy, to the effect that the city is here acting in a proprietary rather than in a governmental capacity. These cases hold that while the business of maintaining a municipal water system and supplying water to private consumers at fixed compensation is public in its nature and impressed with a public interest, it is not an exercise of governmental or police power, and that a municipality so engaged acts in a private or proprietary capacity, in which it is governed by the same rules that apply to a private corporation so acting. *Matter of Water Comrs. of White Plains,* 176 N. Y. 239, 250–251; *Oakes Mfg. Co.* v. *City of New York,* 206 N. Y. 221, 228; *Canavan* v. *City of Mechanicville,* 229 N. Y. 473, 476. In view of these local decisions, the petitioner's reference (Pet. 13) to the local legislative determination that the "act can only be done by the State" would seem to be of no avail.

The petitioner (Pet. 9) erroneously assumes that this Court by employing the word "usual" rather than the word "essential" in the *Powers* case,

supra (p. 227), to describe the governmental functions which alone are immune from Federal taxation has in some way rejected the strictly narrow application of the doctrine established in prior decisions and has recognized the applicability of the rule of immunity in a broader field of state activities. Such an assumption is, we submit, without merit. We think that there was no intent to employ the word "usual" in the *Powers* case in any sense different from the word "essential" used in the *Stone Tracy Co.* case, *supra* (p. 172), or the words "ordinary" and "strictly" used in *South Carolina* v. *United States,* 199 U. S. 437, 451, 461. This seems evident from the citation and approval of the *Stone Tracy Co.* and *South Carolina* cases in this connection in the *Powers* case (p. 225).

CONCLUSION

The decision of the court below is correct. There is no conflict of decisions among the Circuit Courts of Appeals. The petition should be denied.

Respectfully submitted.

STANLEY REED,
Solicitor General.
ROBERT H. JACKSON,
Assistant Attorney General.
SEWALL KEY,
JOSEPH M. JONES,
Special Assistants to the Attorney General.

NOVEMBER 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	3
Summary of argument	5
Argument:	
The petitioner did not render services in connection with an essential governmental function of the State of New York, and his salary is not exempt from Federal income tax	5
Conclusion	31

CITATIONS

Cases:	
Aldrich v. *Tripp*, 11 R. I. 141	9
Ambrosini v. *United States*, 187 U. S. 1	12
Armstrong & Latta v. *Philadelphia*, 249 Pa. 39	9
Aschoff v. *City of Evansville*, 34 Ind. App. 25	8
Ashton v. *Cameron County Dist.*, 298 U. S. 513	29
Bailey v. *Mayor &c. of New York*, 3 Hill (N. Y.) 531	8, 14
Blair v. *Byers*, 35 F. (2d) 326	11
Board of Trustees v. *United States*, 289 U. S. 48	6, 7, 12
Brown v. *Salt Lake City*, 33 Utah 222	9
Burnet v. *A. T. Jergins Trust*, 288 U. S. 508	21
Burnet v. *Coronado Oil & Gas Co.*, 285 U. S. 393	21
Campbell v. *City of Helena*, 92 Mont. 366	8
Canavan v. *City of Mechanicville*, 229 N. Y. 473	9
Carruthers v. *City of Hawkinsville*, 42 Ga. App. 476	8
City Council of Augusta v. *Mackey*, 113 Ga. 64	8
City of Chicago v. *Selz, Schwab & Co.*, 202 Ill. 545	8
City of Galveston v. *Rowan*, 20 F. (2d) 501	7
City of Huntingburg v. *Morgen*, 90 Ind. App. 573	8
City of Oklahoma City v. *Hoke*, 75 Okla. 211	9
City of Philadelphia v. *Gilmartin*, 71 Pa. 140	9
City of Wichita Falls v. *Lipscomb* (Tex. Civ. App.) 50 S. W. (2d) 867	9
City of Winona v. *Botzet*, 169 Fed. 321	7, 9
Coe v. *Wise*, 5 B. & S. 440	9
Collector v. *Day*, 11 Wall. 113	12
Collensworth v. *New Whatcom*, 16 Wash. 224	9

Cases—Continued. Page

Columbus v. *Mercantile Trust Co.*, 218 U. S. 645 29
Commissioner v. *Sherman*, 69 F. (2d) 755 13
Commissioner v. *Ten Eyck*, 76 F. (2d) 515 13
Dammann v. *St. Louis*, 152 Mo. 186 8,
Denman v. *Commissioner*, 73 F. (2d) 193 11
Dunston v. *City of New York*, 86 N. Y. S. 562 9
Educational Films Corp. v. *Ward*, 282 U. S. 379 12
Egelhoff v. *Ogden City*, 71 Utah 511 9
Esberg Cigar Co. v. *Portland*, 34 Ore. 282 9
Fawcett v. *Mt. Airy*, 134 N. C. 125 ..... 20, 24
Flatbush Waterworks Co. v. *People*, 222 N. Y. S. 665 ..... 9, 16
Flint v. *Stone Tracy Co.*, 220 U. S. 107 ..... 10, 12, 13, 25, 29, 30
Fox Film Corp. v. *Doyal*, 286 U. S. 123 ..... 7, 12, 21
Green v. *Frazier*, 253 U. S. 233 20
Group No. 1 Oil Corp. v. *Bass*, 283 U. S. 279 21
Halsey v. *Helvering*, 75 F. (2d) 234 ..... 13, 28
Helvering v. *Powers*, 293 U. S. 214 6,
11, 12, 13, 14, 16, 17, 19, 21, 23, 26, 29
Hoskins v. *Commissioner*, 84 F. (2d) 627 13
Hourigan v. *Norwich*, 77 Conn. 358 8
Huey v. *Atlanta*, 8 Ga. App. 597 8
Indian Motocycle Co. v. *United States*, 283 U. S. 570 ..... 6, 12
Jones v. *Portland*, 245 U. S. 217 20
Keever v. *City of Mankato*, 113 Minn. 55 8
Liggett & Myers Tobacco Co. v. *United States*, 13 F. Supp. 143, 14 F. Supp. 543, affirmed, January 4, 1937 13
Lockwood v. *Dover*, 73 N. H. 209 8
Lynch v. *Springfield*, 174 Mass. 430 8
Lyons v. *Reinecke*, 10 F. (2d) 3 13
Mersey Dock Trustees v. *Gibbs*, 11 H. L. Cas. 686 9
Messersmith v. *City of Buffalo*, 122 N. Y. S. 918 9
Metcalf & Eddy v. *Mitchell*, 269 U. S. 514 ..... 12, 13, 21
Miller Groc. Co. v. *City of Des Moines*, 195 Ia. 1310 8
Munick v. *Durham*, 181 N. C. 188 8
Murray v. *Wilson Distilling Co.*, 213 U. S. 151 14
Nebbia v. *New York*, 291 U. S. 502 27
Oakes Mfg. Co. v. *City of New York*, 206 N. Y. 221 8
Ohio v. *Helvering*, 292 U. S. 360 ..... 14, 16, 19, 21, 26, 27, 29
Piper v. *Madison*, 140 Wisc. 311 9
Public Service Com. v. *City of Helena*, 52 Mont. 527 8
Public Service Com. v. *City of Kirkwood*, 319 Mo. 562 8
Rice v. *City of Portland*, 141 Ore. 205 9
Richmond v. *Warehouse Corp.*, 148 Va. 60 9
Schenk v. *City of Ann Arbor*, 196 Mich. 75 8
South Carolina v. *United States*, 199 U. S. 437 8,
10, 12, 14, 16, 20, 21, 25, 26, 29, 31
State Journal Printing Co. v. *Madison*, 148 Wisc. 396 9
Stoddard v. *Winchester*, 157 Mass. 567 8
Sun Publishing Assn. v. *Mayor*, 152 N. Y. 257 20
Town of Hallett v. *Stephens*, 125 Okla. 157 9

Cases—Continued.

	Page
United States v. *California*, 297 U. S. 175	13, 14, 22
United States Bank v. *Planters' Bank*, 9 Wheat. 904	15
Vilas v. *Manila*, 220 U. S. 345	7
Water Comrs. of White Plains, Matter of, 176 N. Y. 239	9
Wigal v. *City of Parkersburg*, 74 W. Va. 25	9
Willcuts v. *Bunn*, 282 U. S. 216	12, 21
Statutes:	
Revenue Act of 1917, c. 63, 40 Stat. 300, Sec. 201	30
Revenue Act of 1918, c. 18, 40 Stat. 1057	31
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 1211	31
Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 22	2
Miscellaneous:	
An Inquiry into the Conditions Relating to the Water Supply of the City of New York, pp. 5, 9–10	15
Borchard, Government Liability in Tort, 34 Yale Law Journal, 1, 252, 254	7
Brabson, Income Tax Exemptions and the Loss of Federal Revenues, Income Tax Magazine, January, 1937, p. 8	21
67 Cong. Rec., Pt. 3, pp. 2955–2956	31
Fairlie, Municipal Administration (1901), pp. 273, 275	15, 24
Hearings before the Committee of the House of Representatives on Revenue Revision, 1925, pp. 196–197	31
Legislation Relating to the Water Supply of the City of New York, Dec. 1, 1928	15
McQuillin, Municipal Corporations (2d ed.), Secs. 1962, 2852	7
Mim. 3838, IX–2 Cumulative Bulletin 137, 140	31
Pond, Municipal Control of Public Utilities, p. 15 *et seq.*	20
Thompson, Public Ownership	15, 19, 24
Treasury Regulations 74, Article 643	2
World Almanac for 1936	15, 19

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 451

WILLIAM WHITLOCK BRUSH, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 14–17) is not reported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 44) is reported in 85 F. (2d) 32.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 20, 1936. (R. 50.) The petition for a writ of certiorari was filed October 9, 1936, and was granted November 16, 1936. (R. 52.) The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the salary received by the petitioner as chief engineer of the Bureau of Water Supply of the City of New York constitutes income taxable by the United States Government.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, * * *.

Treasury Regulations 74:

> ART. 643. *Compensation of State officers and employees.*—Compensation paid to its officers and employees by a State or political subdivision thereof for services rendered in connection with the exercise of an essential governmental function of the State or political subdivision, including fees received by notaries public commissioned by States, is not taxable. Compensation received for services rendered to a State or political subdivision thereof is included in gross income unless (a) the person receives such compensation as an officer or employee of a State or political subdivision, and (b) the services are rendered in connection with the exercise of an essential governmental function. The

commissions of receivers appointed by State courts are subject to tax for 1928 and subsequent taxable years.

* * * * * *

STATEMENT

The material facts, as found by the Board of Tax Appeals (R. 14–17), are as follows:

The petitioner during the calendar year 1931 was employed as chief engineer of the Bureau of Water Supply of the City of New York. He has been so employed for thirty-six years. This is a statutory office. His duties as chief engineer include the protection of the water supply of New York City from pollution, the determination of the amount of water to be withdrawn from various sources, the operation of the municipal water system, supervision of personnel, all matters connected with the expenditure of moneys allocated for water supply purposes, and the preparation of plans, surveys, and reports on improvements and installations of the water supply system. (R. 14–15.)

In the early days of New York City, water was furnished its citizens by private companies. In certain areas, water is furnished and sold by private companies at the present time. The present water supply system of New York has been built up through the years by the construction of facilities by the city and the acquisition from time to time of private companies supplying certain areas. (R. 15.)

Water furnished by the city for business use is metered and the amount used is charged at a fixed rate. Water for private use is furnished on a flat annual sum basis, which is determined in accordance with the conditions that exist with respect to the particular residence served. Approximately 75% of the cost of maintaining and operating the water system of New York City is attributable to the furnishing of water for business and private use; approximately 25% is attributable to fire protection, street sprinkling and flushing, sewer flushing, supervision of private companies, and the supplying of water to communities outside of New York City. (R. 15.)

The municipal water system of New York City has entailed an enormous expense. The cost of the facilities for bringing water from the Catskills involved an expenditure of more than two hundred million dollars. A plan for additional water supply now under consideration contemplates an expenditure of two hundred and twenty-five million dollars. The sources of water supply of the several private companies now serving some of the outlying sections of the city are nearing a condition of exhaustion. (R. 15–16.)

The Board of Tax Appeals concluded (R. 17) that the salary received by the petitioner as chief engineer of the Bureau of Water Supply of the City of New York was taxable income. The Circuit Court of Appeals affirmed the decision of the Board. (R. 50.)

SUMMARY OF ARGUMENT

There is no statutory provision exempting the petitioner's salary as chief engineer of the Bureau of Water Supply of the City of New York from Federal taxation. The only possible basis for the exemption of the petitioner's salary from tax is the well established principle that agencies and instrumentalities employed by the state governments in the exercise of governmental functions essential to their independence are immune from taxation by the Federal Government.

The Bureau of Water Supply is not operated by the City of New York in the performance of an essential governmental function. The undertaking, while of admittedly great magnitude and for a public purpose, is inherently and traditionally of a proprietary and not a governmental nature, and does not come within the implied immunity from taxation by the Federal Government of the agencies of a State, or its political subdivisions. It follows that the petitioner's salary is subject to Federal income tax.

ARGUMENT

THE PETITIONER DID NOT RENDER SERVICES IN CONNECTION WITH AN ESSENTIAL GOVERNMENTAL FUNCTION OF THE STATE OF NEW YORK, AND HIS SALARY IS NOT EXEMPT FROM FEDERAL INCOME TAX

The case at bar presents the question whether the Federal Government may constitutionally impose

a tax upon the salary of the chief engineer of the Bureau of Water Supply of the City of New York.

Section 22 of the Revenue Act of 1928, *supra,* which applies in this case, imposes a tax upon the net income of every individual, which includes, among other items, all compensation received by the petitioner, unless, because of constitutional limitation, his compensation is immune from the taxing power of the Federal Government. *Helvering* v. *Powers,* 293 U. S. 214, 224.

The petitioner's sole contention is that his salary is immune because his services were rendered in connection with the exercise by the City of New York of a "usual governmental function." (Br. 9–10.) The contention, we submit, is without merit.

The rule of immunity, relied on by petitioner, is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. The reasons underlying the principle mark the limits of its range. *Helvering* v. *Powers, supra,* pp. 224–225, 227; *Board of Trustees* v. *United States,* 289 U. S. 48, 59; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 575, 576. Since the rule is aimed at the protection of the operations of government the immunity does not extend "to anything lying outside or beyond gov-

ernmental functions and their exertions." *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 128; *Board of Trustees* v. *United States, supra.* It is entirely clear that the operation by a municipality of a public utility such as a water works system is not a governmental function.

It is, of course, well recognized that a municipal corporation acts in a dual capacity. It exercises powers which are governmental and powers which are of a private or business character. In the one character a municipal corporation is a governmental subdivision of the State, and for that purpose exercises, by delegation, a part of the sovereignty of the State. In the other character it is a mere legal entity or juristic person. In the latter character it stands for the community in administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred. *Vilas* v. *Manila,* 220 U. S. 345, 356; *City of Winona* v. *Botzet,* 169 Fed. 321, 332 (C. C. A. 8th); *City of Galveston* v. *Rowan,* 20 F. (2d) 501, 502 (C. C. A. 5th).

It is well settled that in the maintenance of a water supply system, the municipality acts in a corporate or proprietary and not in a governmental capacity. McQuillin, *Municipal Corporations* (2d ed.), Secs. 1962, 2852; Borchard, Government Liability in Tort, 34 Yale Law Journal, 1, 252, 254. In fact, we have found no authority holding to the contrary. Some of the authorities,

classified according to States, are listed below.[1] This is the settled rule in New York, the highest court of that State holding that the very function here involved—the operation of the New York City water system—is a private and not a governmental function, and holding, moreover, in applying the doctrine of *respondeat superior,* that an employee of the city, engaged in such proprietary activity, is not an officer or employee of the State of New York, but an agent of the city performing services for the local advantage and benefit of the city and not for the State at large. *Bailey* v. *Major &c. of New York,* 3 Hill (N. Y.) 531, 538–539; *Oakes*

---

[1] Connecticut: *Hourigan* v. *Norwich*, 77 Conn. 358, 365,

Georgia: *City Council of Augusta* v. *Mackey*, 113 Ga. 64, 68–69; *Huey* v. *Atlanta*, 8 Ga. App. 597, 599; *Carruthers* v. *City of Hawkinsville*, 42 Ga. App. 476.

Illinois: *City of Chicago* v. *Selz, Schwab & Co.*, 202 Ill. 545.

Indiana: *Aschoff* v. *City of Evansville*, 34 Ind. App. 25; *City of Huntingburg* v. *Morgen*, 90 Ind. App. 573.

Iowa: *Miller Groc. Co.* v. *City of Des Moines*, 195 Ia. 1310.

Massachusetts: *Lynch* v. *Springfield*, 174 Mass. 430; *Stoddard* v. *Winchester*, 157 Mass. 567,

Michigan: *Schenk* v. *City of Ann Arbor*, 196 Mich. 75, 91–92,

Minnesota: *Keever* v. *City of Mankato*, 113 Minn. 55, 61,

Missouri: *Dammann* v. *St. Louis*; 152 Mo. 186, 196; *Public Service Com.* v. *City of Kirkwood*, 319 Mo. 562, 567, citing *South Carolina* v. *United States*, 199 U. S. 437,

Montana: *Campbell* v. *City of Helena*, 92 Mont. 366; *Public Service Com.* v. *City of Helena*, 52 Mont. 527, 530,

New Hampshire: *Lockwood* v. *Dover*, 73 N. H. 209, 212,

North Carolina: *Munick* v. *Durham*, 181 N. C. 188, 195,

Mfg. Co. v. *City of New York*, 206 N. Y. 221, 228; *Canavan* v. *City of Mechanicville*, 229 N. Y. 473; *Matter of Water Comrs. of White Plains*, 176 N. Y. 239, 250–251; *Flatbush Waterworks Co.* v. *People*, 222 N. Y. S. 665; *Dunston* v. *City of New York*, 86 N. Y. S. 562, 566; *Messersmith* v. *City of Buffalo*, 122 N. Y. S. 918, 921–922.

In this view it is clear that there is in this case no immunity from Federal taxation because the taxpayer here is not an agent of the State of New

---

Oklahoma: *Town of Hallett* v. *Stephens*, 125 Okla. 157, 160; *City of Oklahoma City* v. *Hoke*, 75 Okla. 211, 213,

Oregon: *Esberg Cigar Co.* v. *Portland*, 34 Ore. 282, 289–292; *Rice* v. *City of Portland*, 141 Ore. 205, 210,

Pennsylvania: *Armstrong & Latta* v. *Philadelphia*, 249 Pa. 39, 44; *City of Philadelphia* v. *Gilmartin*, 71 Pa. 140, 158,

Rhode Island: *Aldrich* v. *Tripp*, 11 R. I. 141, 146,

Texas: *City of Wichita Falls* v. *Lipscomb* (Tex. Civ. App.) 50 S. W. (2d) 867, 871–872,

Utah: *Brown* v. *Salt Lake City*, 33 Utah 222, 235–236; *Egelhoff* v. *Ogden City*, 71 Utah 511, 516,

Virginia: *Richmond* v. *Warehouse Corp.*, 148 Va. 60, 70–72,

Washington: *Collensworth* v. *New Whatcom*, 16 Wash. 224,

West Virginia: *Wigal* v. *City of Parkersburg*, 74 W. Va. 25, 28,

Wisconsin: *State Journal Printing Co.* v. *Madison*, 148 Wisc. 396, 403; *Piper* v. *Madison*, 140 Wisc. 311, 314–315,

United States: *City of Winona* v. *Botzet*, 169 Fed. 321 (C. C. A. 8th).

The English authorities regard cities in such matters as "substitutions, on a large scale, for individual enterprise." Mr. Justice Blackburn, in *Mersey Dock Trustees* v. *Gibbs*, 11 H. L. Cas., 686, at p. 706, approving Mr. Justice Mellor in *Coe* v. *Wise*, 5 B. & S. 440.

York engaged in a governmental function of the State or City of New York, but is an agent of the city engaged in a proprietary activity, acting for the peculiar local benefit of the city and not for the State at large. Since the rule of immunity is designed only to protect the States in the exercise of their governmental powers, it does not extend to the local and proprietary activity here in question.

Authoritative declarations by this Court confirm us in our position that the rule of immunity has no place in this proceeding. Thus, in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, this Court, speaking of the rule of immunity said (p. 172):

> It is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, *water* and the like. * * *
>
> The true distinction is between the attempted taxation of those operations of the States essential to the execution of its governmental functions and which the State can only do itself, and those activities which are of a private character. * * * [Italic supplied.]

In *South Carolina* v. *United States*, 199 U. S. 437, the Court said (pp. 461, 462):

> * * * the exemption of state agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend

> to those which are used by the State in the carrying on of an ordinary private business.
>
> * * * * *
>
> The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. * * *

In *Helvering* v. *Powers,* 293 U. S. 214, the Court held that the operation of a similar public utility—the Boston Elevated Railway—was not a governmental function immune from Federal taxation.

And, in *Blair* v. *Byers,* 35 F. (2d) 326 (C. C. A. 8th), and again in *Denman* v. *Commissioner,* 73 F. (2d) 193 (C. C. A. 8th), it was likewise held that the operation of a water supply system was a proprietary rather than a governmental function and officers rendering services in that connection were not exempt from Federal taxation. A similar conclusion was reached by the court below. There are no decisions to the contrary. In view of this wealth of precedent we submit it is too late in the day now to urge a contrary view.

Other considerations compel a like conclusion. In determining whether a certain activity carries immunity from Federal taxation, we must always bear in mind the fundamental reason for denying Federal authority to tax. That reason, as this Court has often said, is found in the necessary protection of the independence of the respective gov-

ernments within their respective spheres under our Constitution. *Helvering* v. *Powers, supra; Collector* v. *Day,* 11 Wall. 113, 125, 127; *Ambrosini* v. *United States,* 187 U. S. 1, 7. These reasons outline the limits of the rule of immunity. *Board of Trustees* v. *United States,* 289 U. S. 48; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 575, 576. Thus the principle of immunity has inherent limitations. *Helvering* v. *Powers, supra; Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 522–524; *Willcuts* v. *Bunn,* 282 U. S. 216, 225, 226; *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 128.

One of these limitations is that the rule be confined to the reasons that brought forth the rule; another is that the Federal taxing power is no less essential than the power reserved to the States, and, while preserving the latter, it is important not to cripple the former. Hence, the successful working of our dual governmental system requires that the principle of immunity be applied so as to interfere as little as possible with the important functions of Federal taxation, and, therefore, the rule is to be applied restrictively. *Willcuts* v. *Bunn,* 282 U. S. 216, 225; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 391. Accordingly, this Court has held that the necessary independence of the States requires that the rule be applied only to those functions "strictly" or "essentially" governmental in character. *South Carolina* v. *United States, supra,* p. 461; *Flint* v. *Stone Tracy Co., supra,* pp. 157,

172. Just what those functions are that are strictly and essentially governmental and necessary to preserve the separate independence of the States is difficult to state in terms of general application. See *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 523.[2] Apparently, they include only the operations of the legislative, executive and judicial branches of state government in the making and enforcing of laws. See *Flint* v. *Stone Tracy Co., supra*, p. 157, 172; *Liggett & Myers Tobacco Co.* v. *United States*, 13 F. Supp. 143, 145, affirmed on other grounds, January 4, 1937, Nos. 161–163, October Term, 1936. It would seem that these are the only "strictly" governmental functions essen-

[2] The rule, as stated, is very general. That there is need for a more concrete formula, susceptible of application to particular cases is evidenced by the present doubt and confusion resulting from attempts to apply the rule. Cf. *Liggett & Myers Tobacco Co.* v. *United States*, 13 F. Supp. 143, 14 F. Supp. 543 (C. Cls.), affirmed on other grounds, January 4, 1937, Nos. 161–163, October Term, 1936; *Commissioner* v. *Ten Eyck*, 76 F. (2d) 515 (C. C. A. 2d); *Commissioner* v. *Sherman*, 69 F. (2d) 755 (C. C. A. 1st); *Halsey* v. *Helvering*, 75 F. (2d) 234 (App. D. C.); *Lyons* v. *Reinecke*, 10 F. (2d) 3 (C. C. A. 7th); *Hoskins* v. *Commissioner*, 84 F. (2d) 627 (C. C. A. 5th). In answer to this need the courts have attempted to lay down more definite formulae. Thus, it has been suggested that only those activities in which the States have "traditionally" engaged are immune. See *United States* v. *California*, 297 U. S. 175, 184–185. On the other hand, it is insisted that activities in which the States "usually" engage furnish the proper test. See *Commissioner* v. *Ten Eyck*, *supra*. Cf. *Helvering* v. *Powers*, *supra*. These tests will be considered below.

tial to the preservation of the States as independent governments—the only functions, which, as a sovereign power, the State itself only can do—the only functions necessary to preserve republican forms of government in the States, as guaranteed by the Constitution. But whether or not other state functions are included, it is clear that the operation by a municipality of a waterworks is not a strictly and essential governmental function necessary to the preservation of independent state governments. In fact, the State has no interest, governmental or otherwise, in the activity in question. In the case of *Bailey* v. *Mayor &c. of New York,* 3 Hill (N. Y.) 531, *supra,* in speaking of the New York City water supply, the court said (p. 539):

> *The state, in its sovereign character, has no interest in it.* * * * [Italics supplied.]

It cannot be said that that in which the State has no interest is essential to its corporate existence.

The rule of immunity has other limitations. It is not only to be strictly construed and confined to the reasons that gave it being—it is further limited by the settled principle that the States may not withdraw sources of revenue from the Federal taxing power by engaging in activities to which, by their nature, the Federal taxing power would normally extend. *Helvering* v. *Powers, supra; South Carolina* v. *United States,* 199 U. S. 437; *Murray* v. *Wilson Distilling Co.,* 213 U. S. 151, 173; *United States* v. *California,* 297 U. S. 175, 184–185; *Ohio* v. *Helvering,* 292 U. S. 360, 368, 369;

see also *United States Bank* v. *Planters' Bank*, 9 Wheat. 904, 907. It is clear that the activity in question falls within this limitation on the rule. In the purveying of water for a price the city is engaged in a profitable business enterprise.[3] It is engaged in an activity, which, at the time of the adoption of our Constitution, was carried on by private companies. (R. 15.)[4] It is engaged in an activity in which private corporations today

[3] Brief *amicus curiae*, by the State of New York, p. 29, states that the operations showed a deficit for 1932 and 1933, but whether this reflected the cost of supplying large quantities of water to the city for fire protection, street sprinkling and the like, aggregating approximately 25% of the total cost of operations (R. 15) does not appear; nor does it appear, nor has the Board found, that the enterprise has not proved profitable. The nature of the activity is such that it is capable of earning profit. The World Almanac for 1936 shows (p. 520) that the city, in 1934, got $35,781,458 from the sale of water. In 1925 it is reported that the net profit per annum, after providing for sinking fund, interest and other charges is $4,725,000. Thompson, *Public Ownership*, p. 218. A survey of the water supply of New York, published by the Merchants' Association of New York in August 1900, shows that "the waterworks of the former City of New York have been and are a source of profit and not a financial burden"; and that "The supplying of water to its citizens becomes an increasingly profitable enterprise." An Inquiry into the Conditions Relating to the Water Supply of the City of New York, pp. 5, 9–10.

[4] The Borough of Manhattan, constituting the old city of New York, had until 1842, no general water supply system. In 1833 the first legislation looking to such a system was enacted. See Legislation Relating to the Water Supply of the City of New York, December 1, 1928, published by the Board of Water Supply, City of New York, p. 1. See also Fairlie, *Municipal Administration* (1901), pp. 273, 275.

can and do perform. In fact, not only do private corporations supply water in other American cities, in New York City at the present time water is furnished and sold by private companies in certain areas. (R. 15.)[5] Some of these private companies are of substantial size. (R. 27.) In the Flatbush area alone some 240,000 persons are supplied with water by one of these private concerns. (R. 26.) See *Flatbush Waterworks Co.* v. *People,* 222 N. Y. S. 665 (1927). It is clear, then, that the city is engaged in a function to which the Federal taxing power would normally extend. The duties of the taxpayer as chief engineer of the New York Bureau of Water Supply are no different from those of similar engineers employed by private concerns engaged in a similar enterprise, and we submit that the city, in undertaking this enterprise, may not withdraw from the Federal taxing power sources of revenue that would otherwise come within it. We see no reason for putting the sale of water in a different category from the sale of liquor (*South Carolina* v. *United States,* 199 U. S. 437; *Ohio* v. *Helvering,* 292 U. S. 360) or from the operation of a street railway (*Helvering* v. *Powers,* 293 U. S. 214). And, if a State may not, by entering into these activities, thus withdraw sources of Federal

[5] The present water supply system of New York has been built up through the years not only by the construction of facilities by the city, but by the acquisition from time to time of private companies supplying certain areas. (R. 15.)

revenue, *a fortiori* a municipal corporation may not. The various contentions made by petitioner and in the several briefs *amici* have no merit.

1. The chief contention of petitioner, as well as of *amici* is predicated upon the premise that this Court in *Helvering* v. *Powers, supra,* has overruled its previous decisions in point and has established a new rule for determining immunity. This premise is false. The conclusion is, therefore, erroneous.

The premise is arrived at by lifting out of its context one phrase of the opinion in the *Powers* case—"usual governmental function." It is assumed that prior to the *Powers* decision the prevalent test for determining immunity was whether the activity was an "essential governmental function." This test, petitioner urges, was rejected in the *Powers* case, and there was substituted a new criterion of immunity—"usual governmental function." (Br. 10.) Petitioner then argues (Br. 14) that in defining "usual governmental function" the courts should not confine their attention to the situation prevailing when the Union was formed, but should look at current developments and expand the concept "usual governmental function" accordingly. The operation by a city of a system for supplying water to its inhabitants, the petitioner concludes, is today a "usual governmental function", for, he asserts, statistics show that it is practically an invariable thing for every city upon reaching

the 100,000 class, to shift from private to public ownership of waterworks, and that as of 1934, 80.39% of the waterworks in this country in cities of 10,000 or more were municipally owned and operated. (B. 13–14.)

Even if the petitioner were right in his assumption that the *Powers* case rejected previous tests and substituted therefor the "usual governmental function" test, it would avail him nothing. Even today, considering current developments, the operation of a municipal water supply is not considered in any jurisdiction that we know of as a "usual *governmental* function." The operation of a water works may be said to be not an unusual corporate activity, but it is not a usual *governmental* activity.

But the real answer is that the *Powers* decision did not change pre-existing rules. Not only did the Court rely with approval on all of the earlier leading decisions on the question, but it considered and applied the rules and limitations thereon as discussed above. This is clear when we consider the phrase "usual governmental function" in its context. In speaking of such functions as the sale of liquor and the operation of a street railway, the Court said (p. 227):

> In each case, the State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal tax-

> ation in order to safeguard the necessary independence of the State. * * *

It is not the frequency with which States engage in an activity but, as this Court held in the *Powers* case, it is the nature of that activity that furnishes the true test. Municipal corporations frequently, and in increasing numbers, own and operate street railways and other means of transportation. Such municipal activity is by no means "unusual",[6] yet under the very decision relied on by petitioner such activity is not beyond the reach of the Federal taxing power. Similarly, States today in increasing numbers are engaging in the sale and distribution of liquor. State liquor stores are today by no means "unusual",[7] yet *Ohio* v. *Helvering,* 292 U. S. 360, approved in the *Powers* case, holds that such activity is not outside the sphere of Federal taxation. Ineed, in the Ohio case the State's argument was very similar to the argument made here (see briefs in that case, pp. 17, 18, 20, 33), but the Court rejected the contention by saying, p. 369 of 292 U. S.:

> The argument seems to be that the police power is elastic and capable of development

---

[6] It is reported that in 1925, 32 cities in the United States and Canada owned and operated municipal railways of which 15 were in the States. Thompson, *Public Ownership,* p. 224. Undoubtedly, the number has increased in the past eleven years.

[7] According to the World Almanac for 1936, p. 189, fifteen States have set up state monopolies for the sale of liquor.

> and change to meet changing conditions. Nevertheless, the police power is and remains a governmental power, and applied to business activities is the power to regulate those activities, not to engage in carrying them on. * * *

This growing movement toward municipal ownership of public utilities is noticeable in many fields. Cities have constantly been extending their fields of endeavor and now maintain and operate waterworks, light and power plants, street railways, bus lines and other transportation systems, gas plants, grain elevators, wood and fuel yards and other merchandising enterprises, public docks, wharves, markets, and the like. This Court noticed the trend in *South Carolina* v. *United States, supra,* and commented thereon at length, see pp. 454–455 of 199 U. S. See also *Fawcett* v. *Mt. Airy,* 134 N. C. 125. The courts accord the local governments the broadest latitude in this direction.[8] As these permissible activities multiply, so the need for the protection of Federal revenues grows. That need is greater today than ever before.[9] It is in answer to this need

[8] As indicating the extent to which the courts permit local governments to go in the ownership of public utilities and other business affected with a public interest see *Green* v. *Frazier*, 253 U. S. 233; *Jones* v. *Portland*, 245 U. S. 217; *Sun Publishing Assn.* v. *Mayor*, 152 N. Y. 257; Pond, *Municipal Control of Public Utilities*, p. 15 *et seq.*

[9] The loss in Federal revenues through the operations of the rule of immunity is great. Accurate figures are not available but the following statistics are of interest. Approxi-

that the courts have repeatedly held that immunity does not extend to non-governmental activities of this sort, and ever since the decision in *South Carolina* v. *United States, supra,* the philosophy of the decisions has been, not to liberalize the rule as argued by petitioner, but to restrict and narrow it in the interest of the Federal revenues. Cf. *Willcuts* v. *Bunn,* 282 U. S. 216, 225–226; *Fox Film Corp.* v. *Doyal,* 286 U. S. 123; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; *Group No. 1 Oil Corp.* v. *Bass,* 283 U. S. 279; *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393; *Burnet* v. *A. T. Jergins Trust,* 288 U. S. 508; *Ohio* v. *Helvering, supra.* Accordingly, the frequency with which cities own and operate water works, far from being an argument in favor of immunity, only demonstrates the need for applying the "inherent limitations" on the rule. Cf. *Helvering* v. *Powers, supra.*

2. Although petitioner does not make the point, the several briefs *amici* assert that in early colonial days in New York, and at the time of the adoption of the Federal Constitution, the Borough of Manhattan owned and controlled certain public wells

---

mately 4,891,000 persons were employed in 1935 by the several States and municipalities. Only 4,300,691 income tax returns were filed with the Federal Government for that year, of which only 1,836,165 were taxable and 2,464,526 were non-taxable. Moreover, whereas 5.20% of the total population filed taxable returns for 1920, only 1.43% filed such returns for 1935. See Brabson, *Income Tax Exemptions and the Loss of Federal Revenues,* Income Tax Magazine, January 1937, p. 8.

from which its inhabitants could obtain water. Thus, they argue, traditionally the supplying of water to its citizens is a function of New York City government, and they invoke to their aid the decision of this Court in *United States* v. *California*, 297 U. S. 175, where, in speaking of the rule of immunity, the Court said (pp. 184–185):

> Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 522–524, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation *traditionally* within it. *Helvering* v. *Powers*, 293 U. S. 214, 225; *Ohio* v. *Helvering*, 292 U. S. 360; *South Carolina* v. *United States*, 199 U. S. 437; see *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 173, explaining *South Carolina* v. *United States, supra.* Hence we look to the activities in which the states have *traditionally* engaged as marking the boundary of the restriction upon the federal taxing power. * * * [Italics supplied.]

As we read the foregoing statement, this Court was not establishing a new rule of immunity; it was merely restating one of the limitations on the rule heretofore discussed, that States may not by entering into new fields of endeavor, withdraw from the Federal taxing power sources of revenue that would normally be within it. As we have shown above, in engaging in the sale of water for profit the

city is seeking to do that very thing. The fact that in colonial times there were in New York City certain publicly owned wells from which people could obtain water, falls far short of showing that the sale of water for a profit was, in 1789, or at any other time, a generally recognized function of *state* government. For a number of years municipal corporations have undertaken to supply water to its inhabitants, but at no time, as the many cases cited above show, has this activity been deemed a state function. It is, and always has been, recognized as a private function of the city's, carried on for its own profit and for the advantage of the local inhabitants, and not for the State at large. The State, as a state government, is not concerned. Traditionally, the States have not engaged in the sale of water.

Moreover, the sale of water is not, traditionally, even a municipal function. There is a distinction in the nature of the activity (cf. *Helvering* v. *Powers, supra*) between the digging of a few wells to which the inhabitants may themselves go for water, and the conduct of the business of selling water for profit. In fact, the interesting historical summary contained in the briefs *amici* does not even show that public wells were prevalent throughout the colonies. The Board of Tax Appeals has found in the present case that in the early days of New York City water was furnished its citizens by private companies, and that in certain

areas water is furnished and sold by private companies at the present time. (R. 15.) And it is stated to be an historical fact that the movement toward extensive waterworks and municipal undertakings did not begin in the United States until the second third of the nineteenth century. Even as late as 1835, Philadelphia was the only important city with a municipal supply. And it was not until about this time that the City of New York began the construction of the Croton reservoir and aqueduct, which was the first large modern system of water supply. Approximately at the same time the movement toward municipal waterworks became noticeable in Great Britain. As late as 1900, however, in England, the water supply of London, Bristol, and five other towns of over 100,000 population was not under municipal control. And as of that time the cities of San Francisco, New Orleans, New Haven, Paterson, St. Joseph, Omaha, Los Angeles, Memphis, and Scranton, each over 100,000 population, were supplied with water by private concerns. Fairlie, *Municipal Administration* (1901), pp. 273, 275; see also Thompson, *Public Ownership* (1925), 204–206; *Fawcett* v. *Mt. Airy*, 134 N. C. 125. Thus, traditionally, the business of selling water is neither a state nor a municipal activity.

3. Petitioner, recognizing that the state cases, including those of New York, are uniformly against him in holding that the operation of a

water supply is a proprietary and not a governmental function, seeks to avoid the force of those decisions on the ground that those cases involve municipal liability in tort actions and have no bearing on the law of taxation or the determination of constitutional immunity. It is perhaps enough to say that those cases do present persuasive analogy and this Court has resorted to such cases in determining the question of immunity from taxation. See e. g., *South Carolina* v. *United States,* 199 U. S. 437, 463. Under the local law, the activity in question is not deemed to be a governmental activity; the taxpayer here is not deemed to be a state officer; and the State, as such, is not concerned with his duties. It should follow automatically that his employment is not so essential to the preservation of the New York State government as to render his salary immune from Federal taxation.

However, we are inclined to agree with petitioner that the rule of immunity from taxation is not at all times the same as the rule of immunity from suit in tort cases. We believe the rule of immunity in taxation is even narrower and more strict than is the rule of immunity from suit. This is evidenced not only by the statements of this Court that immunity from taxation extends only to those functions which are "essentially" or "strictly" governmental (*South Carolina* v. *United States, supra; Flint* v. *Stone Tracy Co.,*

supra), but it is shown, further, by the well-established limitations on the rule of immunity in taxation, discussed above—limitations not affecting the rule of immunity from suit in tort cases. Moreover, there may be instances in which a State as a sovereign may be free from suit, and yet at the same time not immune from Federal taxation, as, for example, in the operation of a state-owned liquor store or in the operation of a state-owned railroad. Cf. *South Carolina* v. *United States, supra; Ohio* v. *Helvering, supra; Helvering* v. *Powers, supra.* Thus, the rule of immunity with which we are here concerned is even narrower and more strict than is the rule in the tort cases referred to, and those cases, therefore, apply *a fortiori* here.[10]

4. Brief *amicus curiae* on behalf of the City of New York (p. 18) states that it is common knowledge that there is often a direct connection between the water supply and the transmission of certain communicable diseases, and urges that the protection of the public health in large cities dictates the

---

[10] The distinction is unimportant in this case, but it may become important in considering certain other municipal functions, such as the maintenance of city streets, parks, sewerage and garbage disposal systems and the like, where the state courts are very nearly evenly divided on the question of whether they are governmental or proprietary. The need for a uniform rule in taxation in such cases is evident, and in such instances, we believe immunity should not be extended even in those States where the municipality is granted immunity from suit.

government operation of the water supply system. The answer is found in *Ohio* v. *Helvering,* 292 U. S. 360, 369, where a similar argument was made—"the police power is and remains a governmental power, and applied to business activities is the power to regulate those activities, not to engage in carrying them on." Moreover, the argument proves too much. Milk, likewise is a transmitter of diseases and as a necessary item in the human diet its distribution is affected with a public interest. Cf. *Nebbia* v. *New York,* 291 U. S. 502. Pure food is likewise essential to the public health, as is also proper clothing, yet, as the court below pointedly observed (R. 47) no one would undertake to maintain that if the city should decide to supply such necessities it would be engaging in an activity necessary to its existence as a government. There are today in New York City private companies supplying water to New York citizens. (R. 15.) The protection of the public health has not dictated the municipal ownership of these.

5. In the court below and in his petition for certiorari in this Court, petitioner contended that the supplying of water in the City of New York was an activity which the city alone could perform because of the magnitude of the task, and, therefore, the activity was a governmental as opposed to a proprietary function. (Br. in support of Pet., pp. 11–13.) He does not make this contention in his brief on the merits, and we assume he has aban-

doned the point. In any event, as the court below pointed out (R. 46), there is no support for the argument in the record. It does not appear that private enterprise adequately encouraged could not perform the task, and to say that it could not in the light of modern private achievement in business on a vast scale, as, for example, the operations of the Pennsylvania Railroad, and the American Telephone and Telegraph Company, would seem to deny probability.

6. In his petition for certiorari, the petitioner urged that the present case is in conflict with *Halsey* v. *Helvering*, 75 F. (2d) 234 (App. D. C.). He does not rely on that case in his brief on the merits. In any event, we do not believe that that case is opposed to our contention here. There, the taxpayer was the city engineer of two New Jersey municipalities, and his duties consisted of advising the municipalities on *all* engineering matters, which specifically included construction, maintenance, and alteration of streets and ways, sewers, waterworks, and lighting systems; the preparation of plans and specifications, and maintaining custody of the same. While advice and preparation of plans in connection with waterworks were among his duties, the taxpayer's employment was in connection with all engineering matters of the towns and his services were rendered only in furnishing the town authorities with information upon which they could act. His services were not rendered

solely in connection with the operation of the water-works system.

7. *Ashton* v. *Cameron County Dist.*, 298 U. S. 513, relied on heavily by petitioner, is readily distinguishable. There the Court merely said, by way of reasoning, that Congress may not tax the bonds issued by a State or political subdivision thereof. "So to do would be an unwarranted interference with fiscal matters of the State—*essentials to her existence.*" (P. 529.) [Italics supplied.] The Court further said that the Cameron County Water Improvement District, created under the laws of Texas, and being vested with certain sovereign powers, including the power of taxation, was a political subdivision of the State, but the Court did not hold that every function to be performed by such political subdivision, or, more particularly, the selling of water to the inhabitants of the political subdivision, was a function of government, essential to the existence of the State as an independent government. *Ohio* v. *Helvering, supra; South Carolina* v. *United States, supra; Helvering* v. *Powers, supra,* at p. 227, and *Flint* v. *Stone Tracy Co., supra,* are to the contrary, and there is no intimation in the *Cameron* decision that the principles established in those cases were intended to be modified in any respect.

8. Reliance is also placed on *Columbus* v. *Mercantile Trust Co.*, 218 U. S. 645, from which the petitioner quotes the statement that "no higher

police duty rests upon municipal authority than that of furnishing an ample supply of pure and wholesome water for public and domestic uses." (P. 658.) That case did not touch on the question here presented. It involved the right of a municipality to construct and operate a waterworks system, when a private concern failed to supply water according to its franchise. *Flint* v. *Stone Tracy Co.*, *supra*, involving the question of immunity, was decided only three months later, wherein it was said (p. 172) that it was no part of the essential governmental function of a State to supply water. If effect be given to the statements in both cases, the conclusion follows that even though a particular activity be a police duty, it is not by reason of that fact an essential governmental function.

Other cases relied on by petitioner were concerned with utterly different state functions and are, therefore, distinguishable on their facts.

9. Finally, petitioner contends (Br. 16–17) that sources of Federal revenues are not affected by the activity in question, because for a century no attempt has been made to tax the salaries of water works employees. It is true that under the War Revenue Act of 1917, Section 201 (a) (c. 63, 40 Stat. 300, 303), Congress did not exercise its taxing power to the fullest, and specifically excepted from the Act compensation of officers and employees of States and their local subdivisions, whether or not they were engaged in essential governmental func-

tions. The exemption was removed in the Revenue Act of 1918 (c. 18, 40 Stat. 1057), but inequalities in administration caused Congress, in Section 1211 of the Revenue Act of 1926 (c. 27, 44 Stat. 9), to refund or abate all such taxes imposed by the 1924 and prior revenue Acts. However, since January 1, 1925, the salaries of employees of municipal waterworks have been taxable. See report of the Hearings before the Committee of the House of Representatives on Revenue Revision, 1925, pp. 196–197; Congressional Record, 69th Congress, 1st Sess., Vol. 67, pp. 2955, 2956; Mim. 3838, IX–2 Cumulative Bulletin 137, 140. We submit that to extend immunity to the salary in question would be to withdraw sources of revenue normally within the Federal taxing power. *Helvering* v. *Powers*, *supra*.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted.

STANLEY REED,
Solicitor General.
ROBERT H. JACKSON,
Assistant Attorney General.
SEWALL KEY,
J. P. JACKSON,
BERRYMAN GREEN,
Special Assistants to the Attorney General.

JANUARY, 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937

FILE COPY

Office - Supreme Court, U
FILED
OCT 9 1936
CHARLES ELMORE CRO
CLE

Supreme Court of the United States

No. 451 October Term, 1936.

WILLIAM WHITLOCK BRUSH,

Petitioner,

against

COMMISSIONER OF INTERAL REVENUE.

MOTION FOR LEAVE TO FILE, AND MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI, AMICUS CURIAE, BY STATE OF NEW YORK.

JOHN J. BENNETT, JR.,
Attorney General.

HENRY EPSTEIN,
Solicitor General,

For State of New York,
Capitol,
Albany, N. Y.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

SUBJECT INDEX.

	Page
Motion for Leave to File Memorandum	1
Memorandum in Support of Petition for Certiorari	4
Facts	4
I. The water supply of New York City represents a governmental function meeting the tests laid down by this Honorable Court	5
II. Taxation by the Federal Government of New York City's water supply, its revenues, or its employees, will burden the City and State directly	6
III. Wherefore, your Amicus, the State of New York, prays that the petition herein for certiorari be granted	7

TABLE OF CASES CITED.

Columbus v. Mercantile Trust Co., (218 U. S. 645, 658)	7
Comm'r of Internal Revenue v. Lamb, (82 Fed. 2d-733)	6
Comm'r v. Sherman, 69 Fed. (2d), 255-759	7
Helvering v. Powers, 293 U. S. 214	5, 7
Indian Motorcycle Co. v. U. S. 283 U. S. 570	5
Kellar v. Los Angeles, 179 Cal. 605	7
Levy Leasing Co. v. Siegel, 258 U. S. 242	6
Metcalf & Eddy v. Mitchell, 269 U. S. 514, 522	6
New Jersey v. New York, 283 N. Y. 336 (1931)	5
Trenton v. New Jersey, 262 U. S. 182	5
U. S. v. California, (80 L. Ed. 367, Feb. 3, 1936)	7

TABLE OF STATUTES CITED.

Charter of the City of New York, §468	4
Statute (Ch. 724 L. 1905)	4

Supreme Court of the United States

No. . October Term, 1936.

WILLIAM WHITLOCK BRUSH,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE.

Motion for Leave to File Memorandum.

To the Honorable the Supreme Court of the United States:

Now comes the undersigned, the State of New York, by its Attorney General John J. Bennett, Jr., through Henry Epstein, Solicitor General, as counsel, and prays leave to file the subjoined memorandum in support of the petition for writ of certiorari herein to the Circuit Court of Appeals, Second Circuit.

1. The problem presented is of paramount concern to the State of New York, as a sovereign State, and to its municipal and political subdivisions. The very essential character of certain governmental functions that have been considered of the essence of sovereign government is being challenged in this proceeding. The supply of wholesome potable water to the people of the State has for generations been accepted by the State and its subdivisions as a truly classic, usual and essential function of government. In very few, a negligible percentage, of the thousands of political subdivisions of the State, is this a private, or semi-public function. In the City of New York, with more than 55 per cent of the State's population, it has been a municipal function for over 100 years.

2. The State government itself has many cognate and like functions that may come within the scope of taxable category if the decision of the Circuit Court of Appeals, Second Circuit, be permitted to stand. The Water Power and Control Commission of the State, operating under the Conservation Law of New York; the Division of Canals and Waterways of the Department of Public Works; the various State Parks, Parkways, Park Commissions; The Reforestation Division of the Conservation Department; The Departments of Health and Mental Hygiene, in so far as operation of sanitariums, hospitals, asylums, etc. are involved, all would come within the scope of the broad decree of the Court from which appeal is sought.

3. In the various cities and political subdivisions such activities as the disposal of sewage, ashes and garbage, street cleaning, playgrounds, public hospitals, health and sanitation clinics and the like would come within the taxing scope of the Federal government if the decision of the Circuit Court of Appeals is to be followed, and as contended by the Bureau of Internal Revenue of the United States.

4. These were at one time private functions and were only assumed by the governments of State and municipal corporations and other political subdivisions as they became essential to the public welfare and a necessary phase of governmental activity. For generations now they have been regarded as essential governmental functions.

5. The key to the reasoning of the Circuit Court of Appeals is found in the following excerpt from the opinion:

> "That which is a proprietary function of a state government when undertaken, and so not immune from federal taxation, does not change its character because of its continuous exercise."

The Court failed completely to appreciate that it was not continuous use but the character of the function, continued in use, which gave it its essential or usual governmental nature.

6. The grave implications of this decision in the mutual cordial relationship of the States with the Federal government can readily be observed, when one considers that the Postal Service, Federal Reserve Banking System and other activities of the Federal government were private and not governmental when first assumed. Can it be said they are not essential or "usual" governmental functions? The water supply of New York City, in its governmental character, antedates the Constitution itself.

WHEREFORE, the State of New York prays that this Honorable Court will grant the petition herein and issue its writ of certiorari to the Circuit Court of Appeals, Second Circuit, as prayed for, and will accept on behalf of the undersigned, for consideration, the following supporting memorandum.

STATE OF NEW YORK,
By:
JOHN J. BENNETT, JR.,
Attorney General.

HENRY EPSTEIN,
Solicitor General,
Counsel.
September 22, 1936.

MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI.

Facts.

Petitioner was the Chief Engineer of the Bureau of Water Supply of New York City, a civil service employee, at full time, and had been in the Department of Water Supply for over twenty years. The Board was created by statute (ch. 724 L. 1905), appointed by the Mayor, and is represented by the Corporation Counsel. It is one of the regular departments of the City government. (Charter of the City of New York, §468).

The Department of Water Supply, of which petitioner was an employee, has charge of all water supply structures and functions, including fire protection, pure and wholesome drinking water, protection from contamination, etc. The City itself uses something over 25% of the water supply. (R. 21.) Petitioner's services cannot be segregated in any such manner.

The cost of this water supply system is a sum approximating $500,000,000 (R. 23) and the projected construction of a new source of supply found to be essential to its inhabitants, will cost the city another quarter billion dollars.* In a decision of this Honorable Court it has been held:

> "Some place must be found and soon acted upon, and taking into account the superior quality of the water and other advantages of the proposed site over others, it at least is not arbitrary or beyond the freedom of choice that must be left to New York."

---

* Message of Governor Lehman to Legislature Feb. 20, 1936.

New Jersey v. New York, 283 N. Y. 336 (1931). In that case the Special Master had found as a fact that "there is a real need for New York City taking immediate steps to increase its water supply." (p. 201—Master's Report.)

Public wells, giving free water to the residents of New York City date back to 1658 and 1686.** The municipal water supply has been a public function ever since. Today in the United States over 80 per cent of the 969 water systems are municipally owned. In New York State the percentage is even greater. (Municipal Atlas and Index, 1934-1935.) Can it be said that to a city of over seven millions of persons, the supply of water is not an essential function of government? Is it less than usual, historic or otherwise when it has been such for more than a century?

Even if we do, as suggested by government counsel in his brief below, "turn to things at the time the Constitution was framed," we have the function so accepted by New York City. Shall such State and municipal functions be subject to Federal taxation?

I.

The water supply of New York City represents a governmental function meeting the tests laid down by this Honorable Court.

Helvering v. Powers, 293 U. S. 214,
Indian Motorcycle Co. v. U. S., 283 U. S. 570,
Trenton v. New Jersey, 262 U. S. 182.

It has been established that the water supply to New York City is an absolute necessity. Must

** New Amsterdam Records—Vol. 7, p. 190.
Common Council of New York—Vol. I, p. 46.

sovereignty surrender and entrust the lives, health and welfare of its residents to the chance of private investment?

More than 25 per cent of the Water Supply Department's expenses are allocated to fire protection, street cleaning, public buildings, sewage and the like.

Reality and not academic discussion determine the exempt quality of municipal functions.

> "Just what instrumentalities of either a state or the Federal Government are exempt from taxation by the other cannot be stated in terms of universal application."
>
> *Metcalf & Eddy v. Mitchell,* 269 U. S. 514, 522.
>
> Also—*Levij Leasing Co. v. Siegel,* 258 U. S. 242.

II.

Taxation by the Federal Government of New York City's water supply, its revenues, or its employees, will burden the City and State directly.

The year 1932 showed a deficit of over $4,000,000. and 1933 of over $7,000,000. (Fol. 98 Record.) Municipal indebtedness results from the function. The taxpayers of the City and State bear the burden.

The limits are not defined, nor the necessary consequences of this extension of the Federal taxing power.

In *Comm'r of Internal Revenue v. Lamb,* (82 Fed. 2d—733) the government sought to tax the salary of

the Secretary of the Board of Park Commissioners of San Francisco. The Circuit Court of Appeals, 9th Circuit, held it an essential function of government and followed *Kellar v. Los Angeles,* 179 Cal. 605.

The same result was reached by the First Circuit, in *Comm'r vs. Sherman,* 69 Fed. (2d), 255—759. Neither of these cases was taken to this Court by the government. Can it be said that such a tax is a burden, but not one on water supply?

The application of the principles of *U. S. v. California,* (80 L. Ed. 367, Feb. 3, 1936), *Helvering v. Powers,* (293 U. S. 214), and *Columbus v. Mercantile Trust Co.,* (218 U. S. 645, 658), to the facts herein forces the conclusion that the determination below is unsound.

III.

Wherefore, your Amicus, the State of New York, prays that the petition herein for certiorari be granted.

Yours, etc.,

JOHN J. BENNETT, JR.,
Attorney General, New York State,

HENRY EPSTEIN,
Solicitor General,
Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 9 1937
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 451. OCTOBER TERM, 1936.

WILLIAM WHITLOCK BRUSH,
Petitioner-Appellant,
against
COMMISSIONER OF INTERNAL REVENUE.

MOTION FOR LEAVE TO ARGUE ORALLY AND BRIEF AMICUS CURIAE, BY STATE OF NEW YORK.

JOHN J. BENNETT, JR.,
Attorney-General.

HENRY EPSTEIN,
Solicitor-General,
For State of New York,
Capitol,
Albany, N. Y.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

Page

Petition for Permission to be heard orally upon argument..... 1
Exhibit "A" 7
Brief of New York State..... 10
Summary of Argument
I. The Department of Water Supply of the City of New York represents and performs a normal and necessary governmental function, meeting the standards laid down by this Honorable Court 10
II. The federal taxation of New York City's water supply will constitute a direct burden on the State of New York 28
III. If the water supply function is immune, the salaries of the city's officers and employees engaged therein are likewise immune 29
IV. The determination of the Circuit Court of Appeals, Second Circuit, and of the Board of Tax Appeals herein should be reversed and the salary of petitioner declared immune from federal income tax..... 30

STATUTES, AUTHORITIES AND CASES.

County Law, Ch. 11 Con. Laws of N. Y. (Ch. 16 L. 1909)..... 2
Charter, City of New York, §468..... 13
Message of Governon Lehman to Legislature, Feb. 20, 1936..... 25
Report of Com. on Fire and Water by Col. DeWitt Clinton, Board of Alderman Doc. No. 61, pp. 194, 195..... 20
The Catskill Aqueduct & Earlier Water Supplies of the City of New York, pub. in 1917..... 14

CASES.

Ashton et al. v. Cameron County Water Improvement Dist. No. 1, 56 Sup. Ct. Rep. 892, Dec. May 25, 1936.....10, 11, 12
Brown Holding Co. v. Feldman, 256 U. S. 170..... 24
Columbus v. Mercantile Trust Co., 218 U. S. 645/658..... 25
Commissioner v. Sherman, 69 Fed. (2nd) 755 (1934) 756-7..... 11
Commissioner v. Ten Eyck, 76 Fed. (2nd) 515..... 29
Flint v. Stone Tracy Co., 220 U. S. 107, 172..... 11
Halsey v. Helvering, 75 F. (2nd) 234 (1924)..... 11
Helvering v. Powers, 293 U. S. 214.....10, 11, 12, 27
Indian Motorcycle Co. v. U. S., 283 U. S. 570..... 10
Levy Leasing Co. v. Diegel, 258 U. S. 242/245..... 24
Metcalf & Eddy v. Mitchell, 269 U. S. 514, 522..... 24

	Page
McCulloch v. Maryland, 4 Wheat. 316	10
Montana Water Co. v. Billings, 214 Fed. 121/125	25
New Jersey v. New York, 283 U. S. 336 (1931)	22, 24
Ohio v. Helvering, 292 U. S. 360	11
People ex rel, Rogers v. Graves et al., No. 139—Decided Jan-4, 1937	29
South Carolina v. U. S., 199 U. S. 437	11
Trenton v. New Jersey, 262 U. S. 182	10
U. S. v. B. & O. R. R. Co., 17 Wall. 322	10
U. S. v. California, 80 L. Ed. (Adv. Opinions) 367/374	11

Supreme Court of the United States

No. 451. October Term, 1936.

WILLIAM WHITLOCK BRUSH,
Petitioner-Appellant,
against
COMMISSIONER OF INTERNAL REVENUE.

Motion for Leave to Argue Orally and Brief Amicus Curiae.

To the Honorable the Supreme Court of the United States:

1. The undersigned, on behalf of the State of New York, pray for leave to argue orally for a period of about fifteen minutes, in behalf of position of appellant in the above cause, and to file the subjoined brief in support thereof.

2. The problem presented in the cause at issue is of vital concern to the State of New York, its political subdivisions and municipal corporations. There are in the State of New York, statutory public municipal corporations and special districts of varied character, governmental agencies all, performing what have been regarded heretofore as normal and vital governmental functions, whose employees, officers, obligations and even the property of which may be subject to federal taxation, if the decision of the Circuit Court of Appeals herein be sustained.

3. The Government of the State of New York as a state is subdivided into nineteen constitutionally created "departments," including a Department of Public Works, which operates the canals and waterways of the State, as well as the highways, bridges, etc., whether toll or free, except those expressly vested in special bodies; a Department of Conservation, directing and operating park facilities, parkways, reforestation, fish hatcheries, etc.; a Department of Mental Hygiene, operating hospitals, sanitaria and asylums; a Department of Health, operating hospitals, sanitaria for tubercular patients, etc. Many of these are productive of some revenues, even though the functions are regarded as governmental.

4. The political subdivisions of the State of New York comprise:

62 counties,
60 cities,
932 towns,
554 villages

---

a total of 1608 political units of government, each operating many functions which are of the character involved in the instant appeal. With few exceptions the larger units of these operate their water supply, street cleaning, sewage disposal, fire protection, street improvement, police protection, public hospitalization and like functions.

5. For performance of such functions of government among the smaller units in the State, statutes*

* County Law—Ch. 11 of Consolidated Laws of N. Y. (Ch. 16 L. 1909). Town Law—Ch. 62 Consolidated Laws of N. Y. (Ch. 634 L. 1932) and numerous special statutes.

have provided for the creation of separate corporate municipalities with various names, whose obligations and employees have always been regarded as free from federal taxation. Among such public bodies corporate are:

236	Water	Districts
33	Water Supply	"
148	Sewer	"
3	Public Dock	"
44	Garbage	"
557	Fire	"
7	Fire Alarm	"
100	Fire Protection	"
205	Pavement	"
836	Lighting	" (Illumination, not Power)
21	Sidewalk	Districts.
1	Traffic	"
1	Park	"
3	Health	"
4	Curb	" (Sidewalks)
1	Oiling	" (Highways)
1	Police	"
1	Hospital	"

a total of 2202 municipal corporations for special functions.

Almost all of these have obligations of a public corporate character; employees in civil service tenure; performing functions more expeditously executed in this manner and otherwise probably unavailable to these smaller units. The supply of potable water and

water for fire protection and public use is the almost sole purpose of the water and water supply districts, of which there are 269 districts aside from the town and city departments which operate as parts of their respective governmental units.

6. For broader functions of larger areas, or statewide in scope, there have been created public legislative corporations, known as "authorities," "commissions," and "districts," which have their own officers and employees, borrow on their own credit, derive revenues from their operations in the nature of self-liquidation of cost of construction,—all of which are however performing functions, normal and traditional to government in the states. These enable the State the better to organize and manage its finances, budgetary problems, taxation and administration, without unduly concentrating power in the State departments. Among such are:

7 Bridge Authorities
2 Port "
5 Parkway and Highway Authorities
4 Drainage and River Regulating Districts
1 Industrial Exhibit Authority
3 Regional Market Authorities
1 Sewer Authority
2 Miscellaneous Districts

a total of 25 special, State created corporate agencies of the State for public governmental purposes.

7. There are also numerous school districts, distinct from city boards of education, which perform the sole function of public education, many making charges,

where possible, to pay for part of the expense. They, too, have the power to incur obligations, borrow, etc.

8. There is appended hereto as Exhibit "A," a summary of the outstanding bonded indebtedness of these various municipal and State public bodies, together with the amount of the State's own treasury funds invested therein, prepared by the Comptroller of the State of New York. It will be observed that these units have borrowed over $587,000,000 and that the State of New York itself has invested more than $72,500,000 of its own funds in such securities. In addition to these treasury investments, the State Insurance Fund, Vocational Rehabilitation Fund, Teachers' Retirement Fund, Aggregate Trust Fund, Special Disability Fund have invested $3,051,715 in securities of water departments, water districts, water works, including those of New York City.

9. The basis of the determination of the Circuit Court of Appeals, and of the Government in this case is that the function of water supply in New York City is proprietary; that it might have been and still be provided by private capital and therefore may be subjected to federal taxation. For that reason the petitioner Brush, a civil service employee of the City of New York for over twenty-three years, is asked to pay a federal income tax on his salary from the City of New York. Subjected to that test, any and all of the functions of the numerous public and municipal corporations enumerated above would be so subject to federal taxation, and we doubt not that the Bureau of Internal Revenue will so contend. The effect of such an invasion of federal taxing power into the realm of State government

will be seriously to jeopardize the hundreds of millions of dollars in outstanding obligations, heretofore regarded as exempt, and will seriously affect the investments of the treasury of the State of New York itself. We cannot overestimate the gravity of the problem presented by this appeal.

WHEREFORE, the undersigned on behalf of the State of New York, contending that the salary of petitioner Brush should not be held subject to taxation by the Federal Government under the federal income tax law, asks leave to be heard orally on the argument of the above cause, and submits for the consideration of this Honorable Court the subjoined brief in support thereof.

Yours, etc.,

JOHN J. BENNETT, JR.,
Attorney-General,
State of New York.
By
HENRY EPSTEIN,
Solicitor General, Counsel.

Dated:

Exhibit "A".

	Amount Outstanding	*Amount held by State Comptroller*
Authorities and Commissions		
Port of New York Authority	$192,147,000.00	$12,094,000.00
New York State Bridge Authority	2,141,000.00	2,141,000.00
Buffalo and Fort Erie Public Bridge Authority	4,000,000.00	300,000.00
Bethpage Park Authority	990,000.00	90,000.00
Lake Champlain Bridge Commission	1,500,000.00	.....
Niagara Frontier Bridge Commission	2,547,000.00	.....
Saratoga Springs Authority	3,150,000.00	.....
Jones Beach State Parkway Authority	5,050,000.00	.....
Whiteface Mountain Highway Commission	1,050,000.00	1,050,000.00
Lenox-Sullivant Drainage Improvement District	73,600.00	.....
Walkill Valley Drainage Improvement District	180,000.00	180,000.00
Industrial Exhibit Authority	330,000.00	330,000.00
Lower Hudson Regional Market Authority	160,000.00	.....
Central New York Regional Market Authority	270,000.00	.....
New York State World War Memorial Authority	None	.....
Rockland-Westchester Hudson River Crossing Authority	None	.....
Henry Hudson Parkway Authority	3,100,000.00	.....

	Amount Outstanding	*Amount held by State Comptroller*
Thousand Islands Bridge Authority	None	.....
Pelham Portchester Parkway Authority	None	.....
American Museum of Natural History—		
Planetarium Authority	650,000.00	.....
Triborough Bridge Authority	30,000,000.00	.....
Marine Parkway Authority	6,000,000.00	.....
Buffalo Sewer Authority	8,250,000.00	1,000,000.00
Hudson River Regulating District	9,150,000.00	1,622,000.00
Black River Regulating District	919,000.00	897,000.00
	271,657,600.00	19,704,000.00
Totals carried forward	$271,657,600.00	$19,704,000.00
Special Districts		
Towns		
Dock	4,050.00)	
Paving	9,818,407.75)	
Sanitary	310,000.00)	2,003,000.00
Sidewalk	243,057.14)	

	Amount Outstanding	*Amount held by State Comptroller*
Miscellaneous	1,271,740.00)	
Drainage	295,084.92)	
Fire	693,865.00)	9,989,195.79
Sewer	22,019,737.23)	
Water	15,398,982.50)	
School	88,402,434.00	38,530,810.46
Villages		
School	63,430,837.00	87,788.00
Cities		
School (except New York City)	114,445,759.00	2,216,150.00
Grand Totals	$587,991,554.54	$72,530,944.25

Dept. of Audit and Control
December 14, 1936

SUPREME COURT OF THE UNITED STATES.

No. 451. October Term, 1936.

WILLIAM WHITLOCK BRUSH,
Petitioner-Appellant,
against
COMMISSIONER OF INTERNAL REVENUE.

BRIEF AMICUS CURIAE OF STATE OF NEW YORK.

I.

The Department of Water Supply, Gas and Electricity of the City of New York represents and performs a normal and necessary governmental function, meeting the standards laid down by this Honorable Court.

Ashton et al. v. Cameron County Water Improvement Dist. No. 1, 56 Sup. Ct. Rep. 892, Dec. May 25, 1936.
Helvering v. Powers, 293 U. S. 214.
Indian Motorcycle Co. v. U. S., 283 U. S. 570.
Trenton v. New Jersey, 262 U. S. 182.
U. S. v. B. & O. R. R. Co., 17 Wall. 322.

The Legal Principles:

The rule of constitutional immunity was laid down in *McCulloch v. Maryland,* 4 Wheat. 316 and followed

through *Helvering v. Powers,* 293 U. S. 214 to *Ashton et al. v. Cameron Co. Water Improvement Dist. No. 1,* Adv. Sheets June 8, 1936, Vol. 80. It is not the tax nor the resulting interference that governs, but the principle itself of governmental immunity. It is an essentially reciprocal principle.

> "That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other."
>
> *U. S. v. California,* 80 L. Ed. (Adv. Opinions) 367/374.

The so-called doctrine of "essential governmental functions", derived from the case of *Flint v. Stone Tracy Co.,* 220 U. S. 107 at 172, and set in rule form by the Bureau of Internal Revenue (R. 9, 10; fols. 25, 28), was rejected by this court in *Helvering v. Powers, supra.* It was an unwarranted extension of a power in a field where inapplicable.

See:

> *Commissioner v. Sherman,* 69 Fed. (2nd) 755, (1934) at pp. 756-7, which case was not appealed by Government counsel.
>
> *Halsey v. Helvering,* 75 F. (2nd) 234 (1934).

Out of the cases of *South Carolina v. U. S.,* 199 U. S. 437; *Ohio v. Helvering,* 292 U. S. 360; *Helvering v. Powers,* 293 U. S. 214, have come the following as rules of law:

1. When a state enters the market place seeking customers and assumes the character of trader or merchant; when it enters into the business

> of buying or selling commodities, *that* business is not immune from federal taxation.
>
> 2. When a state engages in businesses which constitute a departure from *usual* or *traditional* governmental functions, it cannot thereby withdraw sources of revenue from the Federal taxing power to which, by reason of their character, the Federal taxing power would normally extend.

In *Helvering v. Powers, supra,* the Chief Justice spoke of

> "the usual governmental functions that are immune from Federal taxation in order to safeguard the necessary independence of the state;"

and thus stated the principle:

> "the State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from *usual governmental functions.*" (Italics ours.)

It would seem that *Ashton v. Cameron County Water Improvement Dist. No. 1, supra,* is almost decisive of the governmental character of the water supply to a municipal corporate agency of the State. There the district was organized for furnishing "water for irrigation and domestic uses". It supplies all the water to the municipality of Harlingen, Texas, a community of some 15,000 persons. This Court held:

> "It is plain enough that respondent is a political subdivision of the state, created for the local exercise of her sovereign powers." • • •
>
> "If obligations of states or their political subdivisions may be subjected to the interference here attempted, they are no longer free to manage their own affairs;" • • •
>
> "for a very long time this court has steadfastly adhered to the doctrine that the taxing power of

> Congress does not extend to the states or their political subdivisions.'"*

The Facts:

Petitioner—Chief engineer of the Water Supply Bureau of the Department of Water Supply, Gas and Electricity of New York City; civil service employee at full time; served the city for over twenty years in the department. The department was created by statute as one of the city departments and is directed by a Board appointed by the Mayor of the City (Ch. 724 L. 1905; Charter of City of New York, §468).

Historical Summary of Water Supply of the City of New York:

In the old City of New Amsterdam the establishment of a public well was first proposed in 1658 during the incumbency of Peter Stuyvesant as Director General. At a meeting of the Burgomasters held on July 11, 1658 we find:

> "Thursday, 11th July, 1658—in the City Hall. Present: The Herren Olof Stevenson Cortlandt, Paulus Leendersten van der Grift.
> Burgomasters resolved to communicate with General relative to having a public well made in the Heere Straat." (Broadway)[1]

Subsequent to the capture of Fort Amsterdam by the English in 1664, the records indicate that Governor Nicolls dug a well in the Fort and later a public well was dug at the foot of Bowling Green. The pump

* The minority opinion of Mr. Justice Cardozo does not dispute this principle.

[1] Records of New Amsterdam, Vol. 7, p. 190. The General referred to was Director General Peter Stuyvesant.

installed in that well is the first recorded in the City's history.[2]

In 1677, under the English, the Common Council began the systematic construction of wells in the public streets. On February 28, 1676, we find the following in the minutes of the Common Council of the City:

> "Itt is further Ordered that the Severall Weells bee made in the places hereafter menconed (for the publique good of the Cytie) by the inhabitants of Each Streete where the said Wells shall bee made, Viz: one in the streete called over against Rowliff Johnsons the butcher another in the broad way against Mr. Vandickes another in the streete Called the ouer against Derrick Smiths another in the streete Called the over against the howse of John Cavillere, another in the yeard of backside or Cytie hall another in the streete called the over against Cornelius Van Borsums and that the severall Inhabitants take Notice of this Order and putt the same in Execucon with all Possible speede as they will answere the Contrary att their Wills"[1]

On September 10, 1686 the Common Council ordered nine more wells to be built. These were built of stone, "one halfe of the Charge of them to be borne by the inhabitants of every Streete proportionately and the other halfe by the Citty". One or two citizens were appointed to have charge of each well. The practice of dividing the expense between the beneficiaries and the city was continued as long as the public well system existed and is the forerunner of our present day assessment system.

---

[2] See "The Catskill Aqueduct and Earlier Water Supplies of the City of New York" by Edward Hagaman Hall, published in 1917, from which work much of the narrative material herein contained has been taken.

[1] Minutes of the Common Council of the City of New York, 1675-1776, Vol. 1, p. 46. The blanks are found in the original records.

Some of the wells at the end of the Seventeenth Century became well known by name and their locations have been pretty well identified. Among them were the following:

Name	*Location*
De Riemer's Well	Whitehall Street, near Bridge.
William Cox's Well	Near Stadt Huys, at head of Coenties Slip.
Ten Eyck and Vincent's Well	Broad Street between Stone and South Willian Streets.
Tunis de Kay's Well	Broad Street, north of Beaver.
Frederick Wessel's Well	Wall Street, west of William Street.
Rombout's Well	Broadway, near Exchange Place Street.
Suert Olphert's Well	Near last mentioned.

Pumps came into fashion in the first half of the Eighteenth Century and rapidly displaced the old well-sweeps. After the city had bought its first fire engines, around 1740, it became even more necessary to maintain the water supply and in November, 1741, the Assembly enacted Chapter 719 entitled "An Act for mending and keeping in repair the publick wells and pumps of the City of New York." This law provided for the appointment of Overseers of Wells and Pumps, the levying of taxes for their maintenance, etc. Some times a public spirited citizen would give a well and pump to the city if the corporation would agree to keep it in repair. Henry Rutgers made such an offer to give a well and pump in the Out ward in December, 1785.

But generally the expense of the well and pump was jointly borne by the city and the neighborhood.[1]

On April 5, 1785, William Smith contracted to keep the wells and pumps in repair at the rate of £140 per annum; but Smith's job was not a profitable one; the number of pumps and wells was rapidly increasing and the cost of repair mounted with equal pace. The Common Council, therefore, devised the system of electing two Overseers of pumps and wells for each ward. But evidently these new functionaries occasionally neglected their duties, for on September 16, 1789, the Common Council "ordered that whenever the overseers of the Public Wells and Pumps neglect and refuse to do their duty that the Aldn & Assist of the Ward direct the necessary Repairs; lest by the want of water from the public wells and pumps the City may be endangered in case of fire."

During the year 1789, the Common Council approved bills for repairs to wells and pumps amounting to over £408.

The earliest proposal to supply the city from a common public reservoir with water conducted underground through pipes was made to the Common Council by the engineer Christopher Colles in 1774. On

[1] Minutes of the Common Council of the City of New York, 1675-1776, Vol. 5, pp. 164, 219, 223, 234, 240.
On August 26, 1784, for instance, the inhabitants of Frankfort Street petitioned for a well and pump and it was granted. The city's share of the first cost of this well and pump was £39:16:15. The cost of digging a well varied according to circumstances. In October, 1784, Silvanus Seely was paid £4:11:3 for digging a well in the South ward, but Phil Arcularius was paid £40:19:6 for digging one in Frankfort Street in 1785. On November 11, 1784, the Common Council authorized a well in Catharine Street and voted to contribute £7 toward it, later adding £8 more. In July, 1785, the inhabitants of Greenwich Street were given permission to sink two wells at their own expense, the corporation furnishing the pumps. In a similar way in August, 1785, the inhabitants of Chambers Street were permitted to make a well and stone it at their expense, the pump being at the expense of the corporation.

April 22, 1774 Colles proposed to erect a reservoir near the Collect or Fresh Water pond where he had reason to believe that the city would be able to maintain an adequate supply of fresh water, and he proposed that the city should distribute it through the streets by means of pipes made by boring a hole longitudinally through the trunks of small trees. The water was to be pumped into a reservoir from a well by a steam engine and to flow by gravity through the pipes.

When the proposition first came to the Common Council there was uncertainty as to its practicability and advisability. The Council therefore put the subject off and deliberated on it for three months.[1] When it came up for action on July 21, opinion was still divided; but the majority were in favor of the experiment and voted 8 to 2 to undertake it.[2] At the same time they voted to issue notes to the amount of £2600 for the undertakings. Subsequent issues brought the amount up to £9100.[3]

When Augustus and Frederick Van Cortlandt offered to sell the city a site for the reservoir on the east side of Great George Street, now Broadway, between Pearl and White Streets, at the rate of £600 an acre, the members of the Common Council personally went to the new well sunk on the property and tasted the water. Thus, we find in the Minutes of the Common Council of the City of New York, 1675-1776, Vol. 8 at page 47, the following:

"This Board having this day tried the Water of the New Well sunk in the Ground of Augustus

[1] Minutes of the Common Council of the City of New York, 1675-1776, Vol. 8, p. 26.
[2] Id.
[3] Id.

> and Frederick Van Cortlandt, and judging the same to be of a very good quality agreed in their formal Resolution of carrying the proposal of Christopher Colles into Execution and also of Issuing Notes to the Value of £2500, the Form of which said Notes was also agreed to be as follows to wit: * * *''

On August 29, 1774, the Common Council appointed a committee of eight members to superintend the construction of the project,[4] and in November they contracted for the furnishing of 60,000 linear feet of pitch or yellow pine timber for the making of the pipes.[5]

During 1775 the city went diligently ahead with the construction of the well, reservoir and pump house on a slight eminence on the west side of Broadway between Pearl and White Streets. But while the water works were being built the city was thrown into a turmoil of excitement by the news from Lexington and Bunker Hill. The work of construction, however, continued until 1776, but with the critical events of that year the project was completely interrupted, never to be renewed. During the period of the war the construction work was totally ruined.

The first pipeline system of water works was that of the Manhattan Company, which was incorporated in 1799. It is a well known historical fact that the banking privilege contained in the charter of the Manhattan Company was really the main objective of Aaron Burr and his fellow organizers of this company, and that the ostensible purpose of constructing water works was put in the charter merely as a means of covertly avoid-

[4] Id.
[5] Id.

ing the opposition which Burr was certain to encounter from the Federalist party and from Hamilton, who had organized the Bank of New York in 1784.

The fact remains, however, that the company did go ahead with its subordinate purpose of constructing a water works system, built reservoirs and laid a system of distributing pipes in the then small city.

During the first quarter of the Nineteenth Century there was bitter discontent with the inefficiency and unsatisfactory character of the supply of water by the Manhattan Company and there was constant agitation for the restoration of the public municipal water system. Thus, in 1831 the Board of Aldermen of the City adopted a resolution on March 3rd of that year which reads in part as follows:

> "Resolved, that the counsel of the Board, prepare a Memorial to the legislature, setting forth the wants of the city, in relation to a full and ample supply of water * * *; and further setting forth, that the Manhattan Company * * * have not, in the opinion of the Common Council, complied with the conditions of their charter; * * * And that there exists powers in the acts relating to this company, authorizing them to take, by process of law, all streams of water, and to divert water courses from their natural channels; and also in like manner to possess themselves of other property; which powers the Manhattan Company have wholly failed to use, therefore, asking a repeal of the said powers, now vested in said company, and the vesting exclusively of such powers, for the purpose aforesaid, in the corporation of the City of New York."

The service of the Manhattan Company and the quality of their water and their failure to further prosecute

the work of supplying the city with water were condemned in a report made on November 10, 1832 by Col. DeWitt Clinton to the Committee on Fire and Water of the Board of Aldermen (Document No. 61, November 10, 1832). Col. Clinton had been commissioned to report on the present state of the city's water supply and probable additional sources for further supply. In this same report Col. Clinton stated that the municipal water works was a splendid example of a properly operated water supply but that it would soon prove inadequate.[1] Col. Clinton further pointed out that at this time the only supply in the city were the municipal works on 13th Street and those owned by the Manhattan Company.

The Manhattan Company, however, met only a portion of the city's water needs and after the construction of the old Croton system in 1834, it ceased to supply any at all. With its demise the original New York City entered upon an uninterrupted course of municipal operation. Every other private company which had been chartered by the legislature to supply the city with water namely, the Sharon Canal Company, the New York Water Works, the New York Well Company and the New York & Harlem Spring Water Company failed to do so, their charters either having been voluntarily abandoned or having expired by non-user.[2]

The municipal water works just referred to had been constructed in 1829 and consisted of a reservoir in the

[1] Report of the Committee on Fire and Water, by Col. De Witt Clinton, Board of Alderman document No. 61, November 10, 1832, pp. 194, 195.

[2] Report of the Committee on Fire and Water, by Col. De Witt Clinton, Board of Alderman document No. 61, November 10, 1832, pp. 197, 198, 210.

small block between Broadway, Fourth Avenue, 13th and 14th Streets, for the distribution of water for fire extinguishing purposes.

In 1883 the first legislation was enacted wherein commissioners were appointed under legislative enactment to proceed with plans for providing the city with pure and wholesome water (Chap. 36 of the Laws of 1833, entitled "An Act of the Appointment of Commissioners in Relation to Supplying the City of New York with Pure and Wholesome Water"). The Croton water shed was then chosen as the source of supply. The first Croton Aqueduct was constructed, under the provisions of Chapter 256 of the Laws of 1834 and its amendments and supplementary legislation.

The first water supply commission and its successors, the Croton Aqueduct Board, the Department of Public Works and the Aqueduct Commissioners completed the construction of the old and new Croton Aqueducts and all the reservoirs within the Croton water shed.

As early as 1897 and before the Aqueduct Commissioners had completed their work it was realized that an additional water supply was of vital consequence. After much agitation there were enacted in 1905, six statutes relating to the water supply of the City. The principal and most important one of the six was Chapter 724. This law created the Board of Water Supply charged with the specific duty of providing an additional supply of pure and wholesome water for the City of New York. Under this law the present Catskill water supply system with a dependable draft of 600 million gallons has been constructed. The water for this sys-

tem is drawn from the Ashokan Reservoir on the Esopus water shed and from the Schoharie Reservoir on the Schoharie water shed, both being located in the Catskill Mountain area. The Catskill Aqueduct, 92 miles in length, conveys the water to the city and a city tunnel 18 miles long and a number of pipe conduits serve to distribute the water to the five boroughs of the city.

The necessity for an additional supply of water is presently engaging the attention of the city officials. It encompasses an additional supply of water from the drainage areas tributary to the Rondout Creek and the Delaware River. This is the system involved in *New Jersey v. New York,* 283 U. S. 336 (1931). The problem of its financing is presently of grave public debate and concern.

The Governor of the State of New York has, in his special message to the legislature, of February 20, 1936, urged that action must be taken immediately to avert the dangers of a water shortage to the City of New York. The Governor's message (quoted from the New York Times of February 21, 1936) reads in part as follows:

> "If the ground water resources of Kings and Queens are to be preserved and if the water supply resources of the eastern counties are not to be damaged seriously, prompt action may be necessary.
>
> "One evident cure is curtailment of pumping to safe limits and perhaps complete stoppage of the permanent extraction of ground water in Kings. Only thus can the water table be restored to a safe level.
>
> "If New York City now had the Delaware-Rondout water available, the problem would be simpli-

fied. The State Water Power and Control Commission advises me that an early start on the construction of that project is advisable for the well-being of the people of the city and to prevent damage to the water supply interests of the people of Nassau and Suffolk Counties.

"Legislation, much of it of a new and unusual type, is indicated. Such legislation, to be effective, must be based upon reasonably accurate information and upon public understanding of the problem. A considerable body of the required data has already been collected by the United States Geological Survey and by various state and local agencies but this information has not been put in useful shape and has not been published.

"I recommend that the legislature direct the Water Power and Control Commission to make a comprehensive study and report on this entire subject, containing statements as to existing conditions, present and future water supply needs and possible measures of conservation control and development. Such a report should then be published, widely circulated and used as the basis for remedial legislation.

"Time is a vital element. Adverse conditions have arisen because industrial wells are uncontrolled and because it is the duty of no person or authority to regulate withdrawals of water. Their aggravation has been in no wise checked. Further delay may result in the permanent diminution of the valuable water supply resources underlying large areas of Long Island.

"I strongly urge that your honorable bodies attack this problem during this season."

In its brief below, Government counsel urged that we must "turn to things at the time the Constitution was framed." By that test it is evident the City of New York water supply was a governmental function antedating the Constitution and has continued as such.

Application of Law to the Facts:

More than twenty-five percent of the water is used by the city for its own buildings, for sewage, street cleaning and fire protection (R. 28, fol. 84). It is obvious that these cannot be segregated and that the tests laid down by the Circuit Court of Appeals, that "private capital" may be able to supply the needs; or that "continuous exercise" of the function does not give it immunity, are wholly inapplicable to the situation herein presented (R. 46, 48).

Reality, and not metaphysics, determines the character of governmental functions and their consequent immunity:

> "Just what instrumentalities of either a state or the Federal Government are exempt from taxation by the other cannot be stated in terms of universal application."
>
> *Metcalf & Eddy v. Mitchell,* 269 U. S. 514, 522.
>
> "there is a real need for New York City taking immediate steps to increase its water supply." (Master's Report p. 201—in *New Jersey v. New* York, 283 U. S. 336.)

The size of the undertaking and its historic exercise by the City are matters of concern and will warrant distinguishing this from other possible cases and functions. Size was not regarded by the government in its brief below as a factor (pp. 9-10). Yet it has been so recognized by this Court in other circumstances.

Brown Holding Co. v. Feldman, 256 U. S. 170.
Levy Leasing Co. v. Diegel, 258 U. S. 242/245.

The cost to the City of New York has already been over $500,000,000 (R. p. 23) and will cost over a quar-

ter billion dollars more (Governor Lehman—*Message to Legislature, Feb. 20, 1936).* That this cannot be left to the caprice or avarice of private capital is evident and has been recognized by this Court:

> "No higher police duty rests upon municipal authority than that of furnishing an ample supply of pure and wholesome water for public and domestic uses."
>
> *Columbus v. Mercantile Trust Co.*, 218 U. S. 645/658.
>
> *Montana Water Co. v. Billings*, 214 Fed. 121/125.

The Inconsistency of the Bureau of Internal Revenue:

The truth of this litigation must be candidly faced. This suit is an instance of no attempt by a state to effect any insidious withdrawal of sources of federal revenue. *It is, rather, an evidence of a new drive directed at state governmental agencies throughout the country to obtain new sources of revenues for the federal treasury at the expense of the states.* Until this action the employees of the City of New York Water Supply Department never reported their salaries as taxable and were never questioned in their right to such tax immunity as employees of the City. For over one hundred and fifty years the water supply of New York City has been primarily a governmental undertaking, and never provided a cent of federal tax revenues. In fact, had not the cities and states engaged in the vital expansion of governmental functions necessary to the needs of an advancing civilization; had not states and cities taken, to use appellee's own words in brief below, "an active part in promoting and developing their own resources in assisting and aiding their citizens commensurate with public

welfare and higher standards of living and in creating organizations to carry on such purposes", federal revenues themselves from a multitude of other sources might well remain but a small trickle.

We but mention the danger envisaged of a veritable tax war between State and Federal governments, inevitable if this view of the Government and of the Circuit Court of Appeals be upheld. Such a result, opening up such federal activities as the post-office, parcels-post, federal reserve banks and the like, to State taxation (because in their initial character susceptible of private enterprise), would result in a sacrifice of the entire system of American dual constitutional government.

The argument that the services of water supply could still be performed by private capital, stressed by the opinion below, leads to the impasse suggested (R. 46, fol. 137). This test does not determine the nature of the function, whether usually or essentially governmental, or not. Carrying the mails, conduct of schools, coining of money, maintenance of standing armies, police protection, fire protection—all these and many more were at some time or other conducted by private capital and some still are, and might again be so operated. And in like manner many of the activities of the Federal government would be taxable by the States under the reasoning of the opinion below that the test is whether "when undertaken", no matter when or how necessary, is the function assumed by the government (R. 48, fol. 144). Such, we submit, is not the test applied in *Helvering v. Powers,* nor the true test of what is, under the circumstances here disclosed, properly

and normally a governmental function of the City of New York.

No attempt was made by the government below, and none is observed herein, to distinguish between employees and obligations of the particular state or municipal function, at least, insofar as taxation is concerned. *It is the character of the function that is the burden of the government's argument in favor of its right to tax petitioner's salary.* Yet in precisely a like situation, the Bureau of Internal Revenue has ruled that the income from bonds issued to finance a water and power supply to a city is not taxable. This despite the fact that the said bonds are solely payable out of the revenues derived from the operation of the power and light system.

In a letter to the General Counsel of the Reconstruction Finance Corporation under date of Dec. 20th, 1935, the Commissioner of Internal Revenue wrote:

"Mr. James B. Alley,
General Counsel,
Reconstruction Finance Corporation,
Washington, D. C.

In re: Los Angeles
Department of Water and Power

Sir:

Reference is made to your letter of November 30, 1935, submitting an inquiry whether interest on refunding bonds issued by the Department of Water and Power of the City of Los Angeles, California, will be exempt from Federal income taxes.

"These bonds, identified as Electric Plant Revenue Bonds, Refunding Issue, 1935, have

been, it is stated, authorized by the Department of Water and Power for the purpose of refunding an indebtedness of $22,799,000 represented by short-term negotiable notes held by the Reconstruction Finance Corporation.

"It is represented that the bonds are to be issued in the name of the Department of Water and Power and are to be payable solely from the income and revenues derived from the operations of the light and power system.

"It is held that the interest on these bonds will not be subject to income tax under the Revenue Act of 1934.

Respectfully,

(signed) GUY T. HELVERING,
Commissioner."

It is impossible to reconcile the above with the attitude taken in the instant proceeding. The answer is to be found only in an insensate scramble for any kind of revenues in the hope that the victims will not seek the haven of the courts. The States have too great a principle at stake to permit such a tax program to go unchallenged.

II.

The Federal taxation of New York City's water supply will constitute a direct burden on the State of New York.

The City of New York has more than half the population of New York State. The revenues of its water supply department are turned over to the General Tax Fund of the City and from its general revenues and budget the salary of petitioner and other employees of the department are paid. In the year 1931,

for which the tax here in question was levied, the City spent more than it received from water revenues. In 1932 a deficit of more than $4,000,000 resulted and for 1933 of about $7,000,000 (R. 33). These are similar to deficits commented upon in *Commissioner v. Ten Eyck*, 76 Fed. (2nd) 515, from which case also the Government did *not* appeal to this Court.

But more than that, the State of New York has invested in the bonds of water supply districts including those of New York City, the treasury funds of the State itself. Any inroads upon the immunity of the City of New York in respect of said function will result in a corresponding burden upon the State and will affect directly the value of those investments. Here is a property interest of the State that is more than academic. The implications of the attempt to tax state and municipal agencies and their employees are too evident to need further discussion herein. Reference is made to the facts set forth in the petition *(supra)* for the seriousness of the issue.

III.

If the water supply function is immune, the salaries of the city's officers and employees engaged therein are likewise immune.

This would follow logically as a result of the foregoing argument. But this Court has expressly so held in one of its most recent decisions.

In *People ex rel. Rogers vs. Graves et al.* No. 139, decided January 4, 1937, Mr. Justice Sutherland writing for the unanimous Court said:

"The railroad company being immune from taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune."

(N. Y. Times, Report of Opinion, Jan. 5, 1937).

IV.

The determination of the Circuit Court of Appeals, Second Circuit, and of the Board of Tax Appeals herein should be reversed and the salary of petitioner declared immune from Federal income tax.

All of which is respectfully submitted by

JOHN J. BENNETT, JR.,
Attorney General of the State of New York.
HENRY EPSTEIN,
Solicitor General,
Counsel.

FILE COPY

Office - Supreme Court, U.
FILED
JAN 11 1937
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1936.

No. 451

WILLIAM WHITLOCK BRUSH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MOTION ON BEHALF OF THADDEUS MERRIMAN AND HERMAN GOLDBERG FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF AS AMICUS CURIAE.

J. JOSEPH LILLY,
Counsel for Thaddeus Merriman and
Herman Goldberg, Amicus Curiae.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

INDEX.

	PAGE
Motion for Leave to File Brief as *Amicus Curiae*	1
Notice of Motion	2
Brief as *Amicus Curiae*	5
Preliminary Statement	5
Report Below	7
Summary of Argument	7
POINT I. When a city, under authority of its State, constructs, maintains and operates a public water supply system it exercises a necessary and indispensable attribute of sovereignty	8
POINT II. The precedents relied on by the Court below do not support its conclusion	15
POINT III. The better considered decisions support the view that the official salary of the petitioner is not subject to Federal income taxation	23
POINT IV. The condition of things, at the time when the Constitution of the United States was framed, precludes the notion that the salaries of officers or employees of municipal water plants or projects are subject to Federal income taxation	28
POINT V. In the unlikely event of a determination of this appeal, adversely to the petitioner, the decision should maintain the exemption from Federal income taxation of the salaries of the officers of, and the employees under, the Board of Water Supply of the City of New York, whose work neither produces nor contemplates any revenue to the city	29
Conclusion	38
Appendix (New York Laws of 1905, chapter 724)	39

TABLE OF CASES.

	PAGE
American La France Fire Engine Co. v. *Riordan*, 6 F. 2d, 964	14
Armstrong & Latta v. *Philadelphia*, 249 Pa. 39	17
Asher v. *Water Co.*, 66 Kan. 496	10
Ashton v. *Cameron County Water Improvement District No. One*, 298 U. S. 513	16, 23
Beardsley v. *Nicblo Mfg. Co.*, 231 App. Div. 152	17
Blade v. *La Conner*, 167 Wash. 403	10
Blair v. *Beyers*, 35 F. 2d, 326	19, 20, 21
Burnet v. *Colorado Oil & Gas Co.*, 285 U. S. 393	19
In re Cameron County Water Imp. Dist. No. 1, 9 F. Supp. 103	24
Canavan v. *City of Mechanicville*, 229 N. Y. 473	16
City of La Follette v. *La Follette Water L. & Tel. Co.*, 252 Fed. 762	9
Collector v. *Day*, 11 Wall. 124	14, 19
Colorado Central Power Co. v. *Municipal Power Dev. Co.*, 1 F. Supp. 961	18
Columbus v. *Mercantile Trust & D. Co.*, 218 U. S. 645	8, 16, 21
Commissioner of Internal Revenue v. *Harlan*, 80 F. (2d) 660	26
Commissioner of Internal Revenue v. *Lamb*, 82 F. 2d, 733	26
Commissioner of Internal Revenue v. *Sherman*, 69 F. 2d, 755	15, 26
Connecticut v. *Massachusetts*, 282 U. S. 660	14
Davis v. *Commissioner of Sewerage*, 13 F. Supp. 672	13
Denman v. *Commissioner of Internal Revenue*, 73 F. 2d, 193	19, 21
Dunbar v. *City of New York*, 251 U. S. 516	9, 21
Educational Films Corporation of America v. *Ward*, 282 U. S. 379	15
Ellenwood v. *Reedsburg*, 91 Wis. 131	10

	PAGE
Flint v. *Stone Tracy Co.*, 220 U. S. 107	15
German Alliance Ins. Co. v. *Home Water Supply Co.*, 226 U. S. 220	12
Greeson v. *Imperial Irr. Dist.*, 59 F. 2d. 529	9
Halsey v. *Helvering*, 75 F. (2d) 234	26
Harms v. *District of Columbia*, 256 U. S. 650	13
Health Department v. *Rector*, 145 N. Y. 32	9
Hoskins v. *Commissioner of Internal Revenue*, 84 F. 2d 627	27
Ice, Light & Waterworks Co. v. *City of Lake Charles*, 106 La. 65	10
Indian Motorcycle Co. v. *U. S.*, 283 U. S. 570	27
Jamestown & Newport Ferry Co. v. *Commissioner of Internal Revenue*, 41 F. (2d) 920	27
Kansas v. *Colorado*, 185 U. S. 125	9
Kansas v. *Colorado*, 206 U. S. 46	14
Kenwell v. *Lee*, 261 N. Y. 113	8, 35
Lake Shore M. S. R. Co. v. *Ohio ex rel. Lawrence*, 173 U. S. 285	25
Liggett & Myers Tobacco Co. v. *U. S.*, 13 F. Supp. 143	18
Mallory v. *White*, 8 F. Supp. 989	27
Matter of Village of Massena, 126 Misc. 524	9
Metcalf & Eddy v. *Mitchell*, 269 U. S. 514	28
Montana Water Co. v. *City of Billings*, 214 Fed. 121	8
Nebbia v. *New York*, 291 U. S. 502	25
New Jersey v. *New York*, 283 U. S. 336	14
New Orleans v. *Morris*, 105 U. S. 600	10
New Orleans Water Works v. *New Orleans*, 164 U. S. 471	10
Ohio v. *Helvering*, 292 U. S. 360	16, 17
Omaha Water Co. v. *City of Omaha*, 147 Fed. 1	19
People ex rel. Rogers v. *Graves* (not yet reported)	23
Power Co. v. *Cement Co.*, 295 U. S. 142	25

PAGE

South Carolina v. *U. S.*, 199 U. S. 437 17

Tillman v. *District of Columbia*, 256 U. S. 650 13

U. S. v. *Kings County*, 281 Fed. 686 27

Matter of Water Commissioners of White Plains, 176 N. Y. 239 17

OPINION OF THE ATTORNEY GENERAL.

26 O. A. G. 289 12

TEXT BOOKS.

Borchard—Government Liability in Tort 19
Holland—Elements of Jurisprudence, 76 L. Ed. 828 12
Tindall—Origin and Government of the District of Columbia 11

CONSTITUTIONS CITED.

Cons. U. S., Art. 1, §8 11
Cons. U. S., Art. 6, Cl. 3 30
Cons. U. S., Art. 7, §7 8
Cons. U. S., Tenth Amendment 14
Cons. N. Y., Art. 5, §6 30
Cons. N. Y., Art. 8, §10 37
Cons. N. Y., Art. 13, §1 30

STATUTES CITED.

FEDERAL.

33 Stats. L., Pt. 1, p. 244 11
Revenue Act of 1928 (45 Stats. L. 791) 6
Bankruptcy Act of 1898 as amended (48 Stats. L. 798) 23

New York.

	PAGE
Civil Service Law, §2	20, 30
Civil Service Law, §22	30
Civil Service Law, §31	31
Conservation Law, §521	35
Conservation Law, §613	34
Greater New York Charter, §17	22
Greater New York Charter, §67	36
Greater New York Charter, §96	30, 33, 36
Greater New York Charter, §98	30
Greater New York Charter, §100	36
Greater New York Charter, §151	22
Greater New York Charter, §169	37
Greater New York Charter, §226	36
Greater New York Charter, §255	30, 33
Greater New York Charter, §468	36
Greater New York Charter, §469	22, 36
Greater New York Charter, §473	36
Greater New York Charter, §1017	36
Greater New York Charter, §1543	31
Greater New York Charter, §1561	31
Greater New York Charter, §1700	31
Public Officers Law, §10	30
Laws of 1896, Chapter 769	17
Laws of 1905, Chapter 723	34
Laws of 1905, Chapter 724	29
Preamble	29
Section 1	30, 31, 34, 39
Section 2	31, 32, 40
Section 3	32, 34, 41
Section 4	32, 42
Section 5	32, 42
Section 11	32, 43

PAGE

Section 24 ..... 33, 44
Section 26 ..... 33, 45
Section 27 ..... 33, 46
Section 28 ..... 33, 46
Section 29 ..... 33, 46
Section 31 ..... 33, 46
Section 33 ..... 37, 47
Section 34 ..... 33, 48
Section 35 ..... 33, 34, 49
Section 35a 34, 51
Section 36 ..... 34, 51
Section 40 51
Section 41 53
Section 43 ..... 34, 53
Section 46 ..... 34, 54

TREASURY REGULATIONS.

Regulations 74, Art. 643 6

Supreme Court of the United States

OCTOBER TERM 1936.

No. 451.

WILLIAM WHITLOCK BRUSH,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Motion For Leave To File Brief as Amicus Curiae.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Thaddeus Merriman and Herman Goldberg moves this Honorable Court for leave to file the accompanying brief in this case as Amicus Curiae.

J. JOSEPH-LILLY,
Counsel for Thaddeus Merriman
and Herman Goldberg,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1936.

No. 451.

WILLIAM WHITLOCK BRUSH,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

SIRS:

You will please take notice that the foregoing motion will be presented to the Supreme Court of the United States at a session thereof appointed to be held at the Court House of the Supreme Court of the United States in the City of Washington, D. C. on Monday the 11th day of January, 1937, at the opening of Court on that day, or as soon thereafter as counsel can be heard.

Dated, New York, January 7th, 1937.

Yours &c.,

J. JOSEPH LILLY,
Counsel for Thaddeus Merriman
and Herman Goldberg,
Amicus Curiae,
Office & P. O. Address,
68 William Street,
New York City, N. Y.

To:

Boykin C. Wright, Esq.
Attorney for Petitioner,
63 Wall Street,
New York City, N. Y.

The Solicitor General,
Department of Justice,
Washington, D. C.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1936.

No. 451.

WILLIAM WHITLOCK BRUSH,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Defendant.

Brief As Amicus Curiae.

Preliminary Statement.

Counsel for the petitioner, and the Solicitor General as counsel for the respondent, have consented in writing to the filing of this brief. Its bulk is due to the addition thereto (*infra*, pp. 39-54) of an Appendix which sets forth the important provisions of the statute of the State of New York under which the Board of Water Supply of the City of New York functions and operates.

The reason why the undersigned desires to file a brief as amicus curiae herein is that, as attorney for Thaddeus Merriman and Herman Goldberg, he has pending, in the United States Circuit Court of Appeals for the Second Circuit, three cases involving facts and questions of law similar to those involved in the above entitled cause, which will be seriously affected by this Court's decision herein.

The petitioners in the United States Circuit Court of Appeals for the Second Circuit, represented by the undersigned, are, respectively, the retired Chief Engineer and one of the Assistant Engineers of the Board of Water Supply of the City of New York upon whose official salaries for the years 1931 and 1932 Federal income taxes were imposed under the purported authority of section 22 of the Revenue Act of 1928 (45 Stats. L. 791) and Article 643 of Treasury Regulations 74.

The question involved in the undecided cases wherein the petitioners, represented by the writer in the said Circuit Court of Appeals, are concerned is whether their annual salaries as employees of the Board of Water Supply of the City of New York, are subject to Federal income tax.

It is and was the contention of the writer, and of the said petitioners, that such salaries are not and were not subject to Federal income tax.

It is also the writer's contention that, if the above entitled case was correctly decided, nevertheless, his clients' salaries are, for the reasons shown in Point V of this brief (*infra,* p. 29), not taxable by the Federal government. This contention is, however, secondary to the basic contention, urged by the above named petitioner, that when a city supplies itself and its inhabitants with water the work is governmental in character and, in all respects, exempt from interference of any kind, on the part of the United States Government, by taxation either of its operations or its personnel.

Reported Below.

The case at bar is reported in the Circuit Court of Appeals at 85 F. 2d 32.

Summary of Argument.

POINT I. When a city, under authority of its State, constructs, maintains and operates a public water supply system it exercises a necessary and indispensable attribute of sovereignty.

POINT II. The precedents relied on by the Court below do not support its conclusion.

POINT III. The better considered decisions support the view that the official salary of the petitioner is not subject to Federal income taxation.

POINT IV. The condition of things, at the time when the Constitution of the United States was framed, precludes the notion that the salaries of officers or employees of municipal water plants or projects are subject to Federal income taxation.

POINT V. In the unlikely event of a determination of this appeal, adversely to the petitioner, the decision should maintain the exemption from Federal income taxation of the salaries of the officers of, and the employees under, the Board of Water Supply of the City of New York, whose work neither produces nor contemplates any revenue to the city.

POINT I.

When a city, under authority of its State, constructs, maintains and operates a public water supply system it exercises a necessary and indispensable attribute of sovereignty.

Water is one of God's greatest gifts to man. Industry cannot produce it in quantities equal to his needs. IT CANNOT BE CULTIVATED OR MANUFACTURED like groceries or clothing or machinery. It is like air, and only secondary to air, an indispensable necessity without which man and such tremendous things as nations cannot exist.

In New York this factual situation is recognized by Article VII, Section 7 of the State Constitution, which wholly excludes private enterprise and concedes only three per centum of the "wild forest lands" of the State for the "construction and maintenance of reservoirs for municipal water supply" and other public water purposes. (See *Kenwell* v. *Lee*, 261 N. Y. 113, *infra*, p. 35.)

We are authoritatively told that

> "**No higher police duty** rests upon municipal authority than that of **furnishing** an ample supply of pure and wholesome water for public and domestic uses. The preservation of the health of the community is best obtained by the discharge of this duty, to say nothing of the preservation of property from fire, so constant an attendant upon crowded conditions of municipal life."
>
> *Columbus* v. *Mercantile Trust & D. Co.*, 218 U. S. 645, 658;
>
> *Montana Water Co.* v. *City of Billings*, 214 Fed. 121, 125;

City of La Follette v. *La Follette Water L. & Tel. Co.*, 252 Fed. 762, 768;
Greeson v. *Imperial Irr. Dist.*, 59 F. 2d 529, 532;
Matter of Village of Massena v. *St. Lawrence Water Co.*, 126 Misc. 524, 529.

As though to remove any doubt that it regarded municipal water supply as one of the most important of the governmental functions of a city, this Court in the *Columbus* case followed its above quoted language by saying:

> "If a municipality elect to contract with another for the discharge of this FUNCTION, it is under the greatest obligation to require that the contractor shall engage to construct and maintain adequate means and furnish an adequate supply to at all times meet the PUBLIC NECESSITY."

Who can doubt that,

> "The supply of water to the general public in a city has become not only a luxury, but an absolute necessity for the MAINTENANCE OF THE PUBLIC HEALTH AND SAFETY."*

Health Department v. *Rector*, 145 N. Y. 32, 48.

Certainly not this Court, because in *Dunbar* v. *City of New York*, 251 U. S. 516, 518, it said:

> "A city without water would be a desolate place, and if plaintiff's property was in such situation it would partake of the desolation. And, as a supply of water is necessary, it is only an **ordinary and legal**

---

* In Kansas *v.* Colorado, 185 U. S. 125, 142 the same doctrine was pronounced the Court saying:

> "Substantial impairment of the health and prosperity of the towns and cities of the state * * * including its commercial metropolis would injuriously affect the entire state."

> **exertion of government** to provide means for it
> compulsory compensation."

In *New Orleans Water Works* v. *New Orleans,* 164 U. S
471, 481, this Court emphatically held that the adoption b
the defendant city of ordinances relative to the supply o
water to certain of its inhabitants was an exertion of legis
lative power with which no court could interfere in advance

In *Asher* v. *Water Co.,* 66 Kan. 496, 500 the Court indi
cated that:

> "The power to own or otherwise provide a syster
> of waterworks, conferred upon cities, has relation t
> public purposes, and for the public and appertains t
> the corporation in its political or governmenta
> capacity."

Similar doctrines were enunciated in

> *Ice, Light & Waterworks Co.* v. *City of Lak*
> *Charles,* 106 La. 65, 69,

and,

> *Ellenwood & ors* v. *City of Reedsburg & ors,* 9
> Wis. 131, 134.

In *Blade* v. *La Conner,* 167 Wash. 403, 407, the Cou
pointed out that in adopting a plan for the acquisition of
water plant the defendant town

> "was exercising its legislative power."

In *New Orleans* v. *Morris,* 105 U. S. 600, 602, 604, th
Court emphasized that waterworks owned by a city ar
held in trust for its citizens and are not liable to sale unde
execution for ordinary debts against the city. In othe

words, cities own and hold their waterworks precisely as they do court houses, police stations, fire houses and city halls, *i. e.*, as governmental properties, which bear no legal resemblance whatever to such private places as liquor or tobacco stores.

A careful examination of the cases decided in this Court and the highest courts of the several states fails to reveal a single instance where the right of a State to supply its citizens, its municipalities and institutions with water was regarded as anything short of an attribute of sovereignty.

The United States Government has, under its constitutional power to govern the District of Columbia, exercised this power by owning and controlling the water supply system of the District of Columbia (Tindall—Origin and Government of the District of Columbia, p. 202), and its legislative branch has recognized that a public supply of water is

> "necessary for the public safety, health, comfort or convenience"

by its

> "'*Act authorizing the laying of water mains and service sewers in the District of Columbia, the levying of assessments therefor and for other purposes (*id.*, p. 155, 33 Stats. L. Pt. 1, p. 244).

In like manner the executive branch of the Federal Government has recognized the essentially governmental nature of public water supply by holding that

> "The reservoirs, aqueducts and other constructions appurtenant to the water supply of the city of Washington, D. C. are to be considered NEEDFUL BUILDINGS within * * * "

the meaning and intent of Article I, Section 8 of the Constitution of the United States.

26 O. A. G. 289, 1 Military Laws of the United States (1921), §1074, p. 592, W. D. Doc. 978.

It is not to be doubted that in acquiring, operating and maintaining a water supply for the District of Columbia the Federal Government has acted within the fair and reasonable scope of its expressed constitutional powers. In so doing it merely discharged one of the classic functions of government.

> "Administrative law, in the more specific sense of the term deals with such topics as the following:
>
> * * * * * * *
>
> V. The promotion of the material welfare of all the individuals of whom the State is composed, either by the prevention of evil or the production of good. Among the operations carried on by State functionaries for this purpose are the following:
>
> I. Measures of sanitary precaution, such as * * *; THE SUPPLY OF PURE WATER, * * *."
>
> Holland—The Elements of Jurisprudence (13th Ed.) Ch. XVI, pages 375, 376.

In the same paragraph, Holland points out

> "that much of this work, except in very highly centralised States is entrusted to local authorities * * *."

German Alliance Ins. Co. v. *Home Water Supply Co.*, 226 U. S. 220, 227, 228, held that in furnishing water for fire protection a municipality acted in a governmental capacity. No one can be found to dispute this statement. But it is obvious that a city cannot exercise this governmental function without having first located the water and made it available for use by the city.

Harms v. *District of Columbia,* 256 U. S. 650, held that the sprinkling of streets to keep down dust for the purpose of the comfort and health of the general public, was a public or governmental act as contradistinguished from a private or municipal act. How the supply of water for this "public or governmental act" could be made a "private or municipal act" was not attempted to be shown in this case. With even the most slight respect for the decisions cited at pages 8, 9, and 10 of this brief the Supreme Court could not have arrived at any other conclusion than that to which it came in this case.

In *Tillman* v. *District of Columbia,* 29 F. 2d, 442, 443, it was also held that in installing, maintaining and controlling a water sprinkler or shower on one of the public streets of the City of Washington, the defendant was performing a governmental service.

A governmental service cannot be performed without the means with which to perform it, and water is the *sine qua non* for the discharge of the services classed as governmental in the two cases just discussed.

Streets cannot be sprinkled without water, nor can public showers be maintained or operated, without the same essential element, to relieve the public suffering and maintain the public health.

> "The construction of sewers and drains is a public governmental function."
>
> *Davis* v. *Commissioner of Sewerage,* 13 F. Supp. 672, 678.

What is the use of a sewer or a drain if it has no water with which to make it function?

> "The importance of fire extinguishing and prevention of the spread of fire is more than a private concern. It has become a governmental function."
>
> *American La France Fire Engine Co.* v. *Riordan,* 6 F. 2d, 964, 966.

Fires are not extinguished by fire engines but by the water which they pour on a conflagration; and it is absurd to say that while a manufacturer of fire engines sold to municipalities and volunteer companies, is exempt from excise taxes, the municipal employees, such as the petitioner, who furnish and maintain (*infra,* p. 24) the supply of water used in extinguishing fires, must pay a Federal income tax on their salaries.

The supply of water is not a mere commercial enterprise where States and their municipalities take the concern upon themselves. It is, then, not a mere adjective matter of

> "the public safety, health, comfort or convenience" (see *supra,* p. 11).

It is a matter of life or death to the State, where, as this Court recognized in *New Jersey* v. *New York,* 282 U. S. 336, 342,

> "the alternative to settlement is war."

A State that, either directly or through its municipalities, cannot supply its inhabitants with the second necessity of life is not a sovereign. It may be some sort of ineffectual satrapy; but it is not the unlimited sovereign in the determination of questions as to whether it would survive or perish which the Tenth Amendment contemplated. (*Collector* v. *Day,* 11 Wall. 124; *Kansas* v. *Colorado,* 206 U. S. 46; *Connecticut* v. *Massachusetts,* 282 U. S. 660.)

POINT II.

The precedents relied on by the Court below do not support its conclusion.

These cases are enumerated at page 49, folios 146-147, of the transcript of record. They are discussed in the order in which the Circuit Court of Appeals, below, mentioned them.

Flint v. *Stone Tracy Co.*, 220 U. S. 107 (R. 49, fol. 146), involved no question of income taxation (*Commissioner of Internal Revenue* v. *Sherman*, 69 F. 2d 755, 756) and determined nothing more than that income from tax exempt municipal bonds was subject to a federal franchise tax, measured by the entire net corporate income. (*Educational Films Corporation of America* v. *Ward*, 282 U. S. 379, 389.) The case also determined that the Coney Island and Brooklyn Railroad Company and the Interborough Rapid Transit Company were not exempt from federal corporation tax because they were public service corporations. Neither the City of New York nor any of its departments or agencies is a public service corporation. The observation at page 172 of the opinion in the *Stone-Tracy* case that,

> "It is no part of the essential governmental functions of a state to provide means of transportation, supply artificial light, water and the like",

was pure dictum,* not at all related to any question the Court was called upon to decide, and utterly opposed to this

* This is made clear by the two sentences following the above quotation where the Court said that *private companies* engaged for profit in the businesses mentioned stood on the same footing for tax purposes as other private corporations.

Court's opposite pronouncements in *Columbus* v. *Mercantile Trust Co.* (*supra*, p. 8) and *Ashton* v. *Cameron County Water Improvement District No. One*, 298 U. S. 513.

Canavan v. *City of Mechanicville*, 229 N. Y. 473 (R. 49, fol. 146) did not involve any question of taxation. The question there involved was:

> "Does a city which for a compensation supplies water through a water pipe to a building there to be used by an inhabitant, impliedly warrant that the water is wholesome and fit for human consumption" (s.c. 190 App. Div. at pp. 253, 254).

The holding of the Court of Appeals was (229 N. Y. at pp. 476-477):

> "that a private water company or a municipality is not an insurer nor liable as a guarantor of the quality of the water it furnishes to its customers in the customary means of pipes and faucets, and cannot be held liable for injuries caused by impure water furnished by it unless it knew or ought to have known of the impurity; its duty is that of exercising reasonable and commensurate care and diligence in providing an adequate supply of water at all times."

The *Canavan* case indicates a tremendous difference between municipal water supply cases and such cases as *Ohio* v. *Helvering*, 292 U. S. 360, where it was said that (p. 369):

> "When a state enters the market place seeking customers it divests itself of its quasi-sovereignty pro tanto and takes on the character of a trader, so far at least, as the taxing power of the federal government is concerned."

In the supply of water to itself for its indisputably governmental purposes, and to its inhabitants for their use and

consumption, a municipality does not enter the market place.*

What it delivers or is ready to deliver to its inhabitants, is not subject (Greater New York Charter Sec. 469) to competitive selling (*Beardsley* v. *Nieblo Mfg. Co. Inc.*, 231 App. Div. 152, 157), as is the sale of alcoholic beverages (*Ohio* v. *Helvering*, 292 U. S. 360, *South Carolina* v. *U. S.*, 199 U. S. 437) or tobacco (*Liggett & Myers Tobacco Co.* v. *U. S.*, 13 F. Supp. 143).

Matter of Water Commissioners of White Plains, 176 N. Y. 239 (R. 49, fol. 146), decided nothing more than that commissioners of appraisal appointed, pursuant to Chapter 769 of the New York Laws of 1896, in a proceeding to acquire by condemnation all of the property rights and privileges of the appellant water company for the respondent village, were obliged to, and could not do otherwise under the statute, than, appraise the property of the appellant company, including its good will and franchise, at its full value and could not limit their award to an amount contemplated in a contract made by the village trustees with the appellant company, which the village had no statutory authority to make.

The case involved no principle or rule of taxation and is notable only as an illustration of the protection which courts will give to private property.

Armstrong & Latta v. *Philadelphia*, 249 Pa. 39 (R. 49, fol. 146), was an action to replevin tools and machinery, which the court found to be the property of the plaintiffs.

---

* It is more in accordance with the facts of history to say that when a private concern engages in the supplying of water to a community it undertakes to discharge a duty properly belonging to the sovereign.

The defense overruled by the Supreme Court of Pennsylvania, was that the detention

> "was an act by the servants of the city without authority and not in the course of the performance of any duty incident to their office or employment, and that the responsibility for their acts must rest on their own shoulders, and to them the plaintiffs must look for redress."

The case is something of an illustration for the observation made by Judge Symes in *Colorado Central Power Co.* v. *Municipal Power Dev. Co.*, 1 F. Supp. 961, 963 (*infra* p. 19), but it determines nothing as to governmental powers and nothing of any value in a tax case.

Omaha Water Co. v. *City of Omaha*, 147 Fed. 1 (R. 49, fol. 147), did not involve anything having the slightest bearing upon the immunity of municipal instrumentalities and employees from federal taxation. The questions there litigated were the powers of the City of Omaha to make an unalterable contract regarding the rates at which a private contractor would deliver water to private consumers, and whether a city ordinance assuming to reduce such rates violated the contract.

We are not concerned, in the case at bar, with any of the problems that were before the Courts in the cases just discussed. The question, really before the Court in this case, is the ability of the Federal Government to interfere by taxation with the legitimate and proper functioning of the States in caring for and serving what the Congress has, itself, described as

> "the public safety, health, comfort or convenience" (*supra*, p. 11).

There are but three cases which appear to hold that the salaries of engineers or other employees engaged in municipal water supply work are subject to Federal income tax. They are *Blair* v. *Byers*, 35 F. 2d 326, *Denman* v. *Commissioner of Internal Revenue*, 73 F. 2d 193,* and, the case at bar. Each of them ignores the truism that the division of the powers of municipal corporations between those which are denominated public or governmental and those which are described as proprietary or private in character,

> "is, a court made rule in derogation of the fundamental principal that municipal corporations are the creation of the sovereign state. It was first made to enable courts to impose common law liability on municipal corporations for the neglect of their servants, etc., and should not be extended beyond this objective * * *."
>
> *Colorado Central Power Co.* v. *Municipal Power Dev. Co.*, 1 F. Supp. 961, 963.

The rule serves no other purpose than to overcome the ancient holding that governments may not be held to liability for wrong (see Borchard, Government Liability in Tort, p. 258). It does not assume to subject the salaries of municipal employees to Federal taxation or to limit the reserved sovereignty of the States.

The annotation to this Court's opinion in *Burnet* v. *Colorado Oil & Gas Co.*, 285 U. S. 393, which begins at 76 L. Ed. 828, collects and correctly recites all the previous holdings and dicta in the cases, beginning with *Collector* v. *Day*, 11 Wall. 113, where Federal taxation of the salaries of State

---

* Neither the *Blair* nor the *Denman* case was brought up for review by this Court.

officers and employees was mentioned. The first sentence of the note summarizes the decisions, as follows:

> "The taxing power of the Federal Government is impliedly limited by the fact that the Federal Constitution contemplates the perpetual maintenance of the states with their recognized powers unembarrassed and unimpaired by any action of the Federal government. Therefore the rule is well established that the taxing power of the United States does not extend to the means or agencies through which the States perform their inherent governmental functions."
>
> 76 L. Ed. 828 and cases cited.

Blair v. *Byers*, 35 F. 2d. 326 (R. 149, fol. 147) involved a tax upon the income received by the appellee's intestate as the attorney "RETAINED" by the Board of Water Works Trustees of the City of Des Moines during the years 1920-1923. The Board of Tax Appeals found as a fact that during the time of his employment the appellee's intestate was free to engage in other professional work and that his services under his retainer did not appear to be subject to the control of the board of trustees which had retained him. On this, the Eighth Circuit predicated the conclusion that the deceased attorney, unlike the petitioner in the case at bar (Opinion below, R. 44, fol. 132), had not become an officer or employee of the political subdivision, but was an independent contractor whose compensation was not exempt from income tax.

In the case at bar there can be no doubt either under the law (New York Civil Service Law Sec. 2) or the facts (R. 20, fol. 58) that the services rendered by the petitioner to the City were exclusive, although it is not conceded that exclusiveness of service is the sole badge of governmental

employment. The professional staff of the United States Department of Justice, *e. g.*, are not required to abandon private employment, but no one would doubt that they are Federal officers and employees, whose salaries are not subject to State taxation.

Blair v. *Byers* was wrongly decided on its own facts. The Court's legal deductions from the facts found in that case by the Board of Tax Appeals would make it impossible for a municipality to obtain the legal services of a lawyer of distinguished ability, and force it to employ $2500 per year counsel to loaf on work of the highest importance.

Denman v. *Commissioner of Internal Revenue,* 73 F. 2d 193 (R. 49, fol. 147) was an attempt by the executor of the deceased manager of the waterworks system of the City of Des Moines to vacate the income tax deficiencies imposed by the Commissioner of Internal Revenue against the estate of the decedent. The case held flatly, following the same Court's precedent in *Blair* v. *Byers,* 35 F. 2d 326, and citing many irrelevant cases, that the salary of the deceased municipal water works manager was subject to Federal income taxation. In its discussion the opinion in this case, while lavish in the quotation of dictum, passes over in silence the pertinent statements as to the governmental nature of municipal water supply made in *Columbus* v. *Mercantile Trust Co.,* 218 U. S. 645 and the other Federal cases cited above at page 8, and *Dunbar* v. *City of New York,* 251 U. S. 516, *supra,* p. 9. The case was as unwisely decided as *Blair* v. *Byers,* but, being something of a precedent may not be ignored.

The peculiar facts of the Denman case may be said to distinguish it greatly, from the case at bar. There the board of water works trustees were, for all practical pur-

poses, quite independent of the city of Des Moines, and their employees were not employees of the city, but of the trustees only. This independence went so far as to permit the trustees, within a statutory limitation of $350 per mile of main pipe, to make whatever annual charge they deemed proper for the water they supplied to the city for its proper governmental and municipal purposes and the state establishments within the city. No free water was supplied to any person or institution and the accounts, management and control of the water works were kept separate from those of the other city departments. In New York City the water rates fixed by the Commissioner of Water Supply Gas and Electricity for privately owned properties are subject to the approval of the Board of Aldermen (G. N. Y. Charter § 469 sd. 4), which is the legislative power of the City of New York (id. §17), and when paid are forthwith delivered to the City Chamberlain (Code of Ordinances, Cap. 25 §25), who is the receiver of all moneys paid into the treasury of the city (G. N. Y. Charter §151 sd. 5). The Department of Water Supply does not charge, and has no power to fix any charge against the City for the water it consumes.

None of the cases upon which the Court below relied, as we have shown above, involved the right of the Federal government to impose income taxes upon the salaries of municipal employees engaged in the work of water supply except the Blair and Denman cases, which were wrongly decided by the Eighth Circuit. Such work is, as the Congress declared it to be,

> "necessary for the public safety, health, comfort or convenience" (*supra*, p. 11),

and, as such, beyond the Federal taxing power.

POINT III.

The better considered decisions support the view that the official salary of the petitioner is not subject to Federal income taxation.

The most authoritative decision of this Court for the purposes of this appeal is *Ashton* v. *Cameron County Water Improvement District No. One*, 298 U. S. 513.* There, the respondent water improvement district, filed a petition and plan, under sections 78, 79 and 80 (48 Stats. L. 798) of the Bankruptcy Act of 1898 as amended by the Act of May 24, 1934, for a readjustment of its outstanding bonds. This Court held that:

> "the respondent [water improvement district] is a political subdivision of the State, created for the local exercise of her sovereign powers * * *. Its fiscal affairs are those of the State, not subject to control or interference by the National Government, unless the right to do so is definitely accorded by the Federal Constitution" (pp. 527-528),

and further (p. 532):

> "that the taxing power of Congress does not extend to the States or their political subdivisions."

As recently as January 4, 1937, this Court held, in *People of the State of New York, ex rel., Rogers* v. *Graves, et al.* (No. 139, October Term, 1936, not yet reported), that the Panama Railroad Company, a New York corporation, acquired and utilized by the Federal government in virtue of its substantive powers under the Constitution, was:

Rehearing denied Oct. 12, 1936, 81 L. Ed. mem. p. 65.

"immune from state taxation,"

and that it followed, necessarily:

> "that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune."

The question in the *Rogers* case was the immunity from taxation by the State of New York of the appellant's salary as general counsel for the Panama Railroad Company. Unless the *Rogers* case was wrongly decided, the petitioner in the case at bar possesses the same immunity from taxation by the Federal government of the fixed salary paid to him by the City of New York as compensation for his services in

> "supervising the maintenance of an adequate supply of pure and wholesome water for the city of New York and its inhabitants" (Opinion below, R. 44, fol. 132).

The affirmed decision of the District Court in the *Ashton* case said that:

> "The reclamation of arid land by irrigation has long been recognized to be a matter of public interest, for the general welfare, and a GOVERNMENTAL FUNCTION."
>
> *In re Cameron County Water Improvement Dist. No. 1,* 9 F. Supp. 103, 105.

Shortly thereafter this Court said:

> "In the arid land states the use of water for irrigation, although by a private individual, is a PUBLIC use."

California Oregon Power Co. v. *Beaver Portland Cement Co.*, 295 U. S. 142, 145.

With the law so firmly established that the reclamation of agricultural land through irrigation is a local exercise of the SOVEREIGN POWER of a State, it is no less true that the forestalling of the desolation that would be the City of New York (see *supra*, p. 9) without an adequate supply of water, which is the exact kind of work in which the petitioner is engaged, is a governmental function, fully as important (see *supra*, p. 8) as that of preventing robbery and murder.

In its epochal decision in *Nebbia* v. *New York*, 291 U. S. 502, 524, this Court pointed out that it had

> "from the early days affirmed that the power to promote the general welfare is inherent in government."

Earlier in *Lake Shore M. S. R. Co.* v. *Ohio ex rel. Lawrence*, 173 U. S. 285, 300, the Court said:

> "The power of the state by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals, or the public safety."

The work of maintaining a suitable supply of water for a city is essentially in promotion of the general welfare, the public convenience, health and safety and, as physical cleanliness is generally regarded as an inducement to morality, it may also be said to be in furtherance of the public morals.

We have been told that

> "The creation and maintenance of public parks is a GOVERNMENTAL FUNCTION of a state and its exercise is essential to the health and general welfare of all the citizens of a state."
>
> *Commissioner of Internal Revenue* v. *Sherman*, 69 F. 2d, 755, 759;
>
> *Commissioner of Internal Revenue* v. *Lamb*, 82 F. 2d, 733.

The above cases held that the salaries of a municipal superintendent of public parks and of a secretary of a municipal board of park commissioners were not subject to Federal income taxation. If

> "the creation and maintenance of public parks is a governmental function of a state",

as no one denies, how much more is it a governmental function to supervise the maintenance of an adequate supply of pure and wholesome water for a great city (Opinion below, R. 44, fol. 132) which is the work in which the petitioner is engaged? A city can exist, after a fashion, without parks, but it cannot exist without water. (See cases, *supra*, pp. 8-10).

In addition to the above there are the following cases in which the salaries of various municipal employees were held to be exempt from Federal taxation:

Commissioner of Internal Revenue v. *Harlan*, 80 F. (2d) 660, where it was held that the salary of the attorney for a bridge and highway district could not be taxed.

Halsey v. *Helvering*, 75 F. (2d) 234, where it was held that the salary of a township engineer could not be taxed.

Mallory v. *White*, 8 F. Supp. 989, where it was held that the salary of a physician in a public hospital could not be taxed.

U. S. v. *Kings County*, 281 Fed. 686, where it was held that the county could not be required to collect and pay over to the Federal government the transportation tax imposed by the Revenue Acts of 1917 and 1918.

Jamestown & Newport Ferry Co. v. *Commissioner of Internal Revenue*, 41 F. (2d) 920, where it was held that the stock of the ferry company, owned in its entirety by the town of Jamestown, R. I., was not subject to Federal income tax.

Hoskins v. *Commissioner of Internal Revenue*, 84 F. (2d) 627, where it was held that the salary of the Superintendent of cafeterias of the Fort Worth public schools was exempt from Federal taxation.

There is also *Indian Motorcycle Co.* v. *U. S.*, 283 U. S. 570, 577, where in behalf of a private manufacturer this Court said:

> "the governmental agencies and operations of the states have the same immunity from Federal taxation that like agencies and operations of the United States have from taxation by the states."

In any rational view the petitioner is no less exempt from Federal income taxation than his fellow laborers for the public weal in the city's fire, police and health departments. Indeed, without the labors of the petitioner and his associates, the said strictly police power departments would be worse than ineffective.

POINT IV.

The condition of things at the time when the Constitution of the United States was framed precludes the notion that the salaries of employees of municipal water plants or projects are subject to Federal income taxation.

When the Constitution came into being the wells which supplied the then tiny City of New York with water were publicly owned and publicly operated. So also were the wells in Philadelphia where the convention met. To the fathers of the Constitution, devoted as they were to the study of the Bible and ancient history, it was not news that Athens, Rome, Alexandria, Carthage, Herculaneum, Pompeii, Jerusalem, Paris, Nineveh, Cairo, Heliopolis, Syene, Babylon, Tyre and Sidon, all had municipal water supplies.

Down to very recent years there has been no attempt by the Federal government to reach the salaries of municipal water employees through income taxation. The reason may be found in the fact that in *Metcalf and Eddy* v. *Mitchell*, 269 U. S. 514, 519, the Collector of Internal Revenue did not press his writ of error from the determination of the District Court that the salaries of the plaintiffs respectively as chief engineer of the Kennebec Water District and as a member of the board of engineers of the North Shore sanitary district (299 Fed. 812, 813) were not subject to Federal taxation.

There is not the slightest doubt (Opinion below, R. 44, fol. 13) that the petitioner is one of the

"appointed regular officials of a subdivision of a state" (299 Fed. at p. 813).

Neither can there be any reasonable doubt that the work in which he is engaged was work conducted by the municipal government at the time the Republic was founded and, although tremendously expanded, fully within the contemplation of the founding fathers as a governmental and not a proprietary function of the States.

POINT V.

In the unlikely event of a determination of this appeal adversely to the petitioner the decision should maintain the exemption from Federal income taxation of the salaries of the officers of and the employees under, the Board of Water Supply of the City of New York, whose work neither produces nor contemplates any revenue to the city.

The Board of Water Supply of the City of New York is an instrumentality created by Chapter 724 of the New York laws of 1905. The preamble of the statute describes it as

> "An Act to provide for an additional supply of pure and wholesome water for the city of New York; and for the acquisition of lands or interests therein, and for the construction of the necessary reservoirs, dams, aqueducts, filters, and other appurtenances for that purpose; and for the appointment of a commission with the powers and duties necessary and proper to attain these objects" (2 N. Y. Laws 1905, p. 2027).

The three commissioners who constitute the Board are appointed by the Mayor of the City of New York, are re-

quired to be residents of the city and are prohibited from holding any other public office except that of Notary Public or Commissioner of Deeds (Act §1, *infra*, p. 39).

Section 1 of the statute (*infra*, p. 39) expressly declares the members of the Board to be public officers. Before entering upon the discharge of their duties (N. Y. Public Officers Law §10) they must take the oath of office prescribed by Article VI, Clause 3, of the Constitution of the United States and by Article XIII, Section 1 of the Constitution of the State of New York, and they are removable only for incompetency or misconduct shown after a hearing upon due notice and stated charges (Act §1, *infra*, p. 40). In this respect their tenure of office is rather similar to that of their subordinates who are veterans or exempt volunteer firemen (N. Y. Civil Service Law, §22, sd. 1).

The Board is authorized to select and appoint a secretary, and such engineers, surveyors, draughtsmen, stenographers, clerks and employees as may be necessary, and to fix their compensation (Act §1, *infra*, p. 39). The attorney at law and legal adviser of the Board is the Corporation Counsel of the City of New York (Act §1, *infra*, p. 39) who is the head of an administrative department of the city (Greater New York Charter §§96, 98) and the attorney and counsel for the city, its boards, departments and officers (*id.* §255).

The Board's subordinates of the various grades are "so far as is practicable" in the "competitive" (Cons. N. Y. Art. V §6) civil service of the City of New York (N. Y. Civil Service Law §2).

These employees, apart from those who are additionally protected by veterans' legislation, are removable only for cause (N. Y. Civil Service Law, §22, as last amended by L.

1924, Ch. 612, Greater New York Charter, §1543), and may not be required to do or perform any service or work outside of their public employment (Greater New York Charter §1561). They have all the rights of civil service standing, priority of service and preference for reinstatement (N. Y. Civil Service Law §31, as last amended by L. 1936, Ch. 562) enjoyed by other civil employees of the State of New York and its municipalities and are entitled to become members of the New York City Employees Retirement System (Greater New York Charter, §1700).

In briefest summary, so far as pertinent upon this inquiry, the duties, rights and powers of the Board of Water Supply of the City of New York, are:

1. To appoint one of its own members as President of the Board and adopt a seal and by-laws for the transaction of its business (Act §1, *infra*, p. 39).

2. To select and appoint the Board's subordinates of all ranks and fix their compensation (Act §1, *infra*, p. 39).

3. To ascertain what sources exist and are most available, desirable and best for an additional supply of pure and wholesome water for the city (Act §2, *infra*, p. 40).

4. To make such surveys, maps, plans, specifications, estimates and investigations as it may deem necessary for the purposes of its creation and report them to the Board of Estimate and Apportionment with recommendations as to action to be taken, so that the two boards may be able to determine from what source or sources and in what manner the City of New York may obtain an additional supply of pure and wholesome water (Act §2, *infra*, p. 40).

5. To make such special studies, investigations, recommendations and reports with regard to the water supply of the city or its delivery and distribution among the boroughs as the Board of Estimate and Apportionment may deem advisable (Act §2, *infra*, p. 40).

6. Upon modification or rejection, in whole or in part, by the Board of Estimate and Apportionment of its recommendations or reports to prepare and submit to the Board of Estimate and Apportionment further reports, surveys, maps, plans, specifications, estimates and investigations and to continue so to do, under the direction of the Board of Estimate and Apportionment, until a map, plan or plans contemplated by the statute, shall have been approved and adopted by the Board of Estimate and Apportionment (Act §3, *infra*, p. 41).

7. To enter upon any land or water for the purposes for which the Board exists (Act §4, *infra*, p. 42).

8. To prepare, reprepare, submit and resubmit, in specified form, to the Board of Estimate and Apportionment, maps of the proposed sites, dams, reservoirs, aqueducts and other works of construction and the appurtenances thereof until the works proposed by it shall have been finally approved by the Board of Estimate and Apportionment (Act §5, *infra*, p. 42).

9. After payment or deposit by the city of one-half of the assessed valuation of land included within a condemnation to enter upon, use and occupy it for the purposes of constructing and maintaining upon it the works and appurtenances contemplated by the statute (Act §11, *infra*, p. 44).

10. To make agreements for the compensation of the private owners of realty included in an approved plan, and with the proper officers of the State for the acquisition of lands owned by the State (Act §24, *infra*, p. 44).

11. To determine, prepare and submit to the Corporation Counsel for approval as to form, forms of contracts and specifications for the doing of all or part of the work and the furnishing of all or part of the material, required by an approved plan (Act §26, *infra*, p. 45).*

12. With unimportant exceptions (Act §34, *infra*, p. 48), to advertise for sealed bids or for proposals for the doing of the work or the furnishing of the materials called for in an approved contract (Act §27, *infra*, p. 46).

13. To receive bids or proposals for work or material (Act §28, *infra*, p. 46).

14. To accept the best bids or proposals in response to its advertisements or, if so advised, to reject all bids and readvertise, and to relet all abandoned or terminated contracts (Act §29, *infra*, p. 46).

15. To direct, supervise and inspect the doing of all work and the furnishing of all materials on contracts let by it (Act §31, *infra*, p. 47).

16. To build, construct, repair and maintain such additional highways and bridges as may be made necessary by the construction of any reservoir (Act §35, *infra*, p. 49), and make rules and regulations to prevent improper and

---

* The Board of Water Supply differs from the administrative departments of the city (Greater New York Charter § 96) in that the Corporation Counsel does not prepare the contracts which it makes (id. § 255).

destructive use of such highways and bridges (Act §35a, *infra,* p. 51).

17. To provide police protection to the localities in which it is constructing work and for that purpose to appoint and remove uniformed police officers, who are peace officers (Act §35, *infra,* p. 49).

18. To provide itself with such suitable offices, furniture, safes, supplies and conveniences as may be suitable and proper to enable it to perform its duties (Act §44, *infra,* p. 53).

19. To file a monthly report with the Comptroller of the City of New York of all its expenses and liabilities for the preceding month (Act §36, *infra,* p. 51).

20. In addition to the powers specifically conferred to have such further powers as may be requisite to the efficient performance of the duties imposed upon it by the statute (Act §1, *infra,* p. 39).

No step looking to the acquisition by the city of lands for its water supply may be taken, under the statute, unless the maps and plans prepared by the Board of Water Supply and adopted by the Board of Estimate and Apportionment (Act §3, *infra,* p. 41) shall have been submitted to and approved by the State Water Supply Commission (Act §46, *infra,* p. 54).

This last mentioned body was erected by Chapter 723 of the New York Laws of 1905. It is now known as the Water Power and Control Commission (N. Y. Conservation Law §613, sd. 1, as amended by L. 1928, Ch. 242, §39), and its general powers over the water supplies of the munici-

palities* of the State are continued in Section 521 of the Conservation Law of the State of New York.

From the above and the statute (*infra*, p. 39 *et seq.*) under which it exists, it is patent that the members of the Board of Water Supply of the City of New York and their subordinates are not engaged

> "in supplying to the public for a direct charge, what it could, and otherwise would, procure from private sources"

(Opinion below R. 47-48, fols. 141-142).

THE BOARD OF WATER SUPPLY NEITHER REALIZES NOR HANDLES ANY MONEY. NEITHER DOES IT DELIVER ANY WATER EITHER TO THE CITY OF NEW YORK OR TO ANY OTHER PERSON, MUNICIPALITY, AGENCY OR CORPORATION.

It has no authority to do any of these things.

For all practical purposes its functions are ended as the work of construction on each water project is completed and before any water from it is supplied or distributed.

The agency of the City of New York, which has jurisdiction, charge and control

> "1. Of all structures and property connected with the supply and distribution of water for public use, except as the same shall be owned by private corporations, including all fire and drinking hydrants and all water meters.

---

* For the purposes of its water supply legislation a municipal corporation of the State of New York is a county, town, school district, village, city or other territorial division of the State, established by law with powers of local self-government. The term does not include a water district (Kenwell *v.* Lee, 261 N. Y. 113, 117).

> 2. Of furnishing the water supply and maintaining its quality, and of all work necessary to deliver the proper and required quantity of water with ample reserve for contingencies and future demands.†
>
> 3. Of the collection of the revenues from the service, sale or use of water from the public water supply.*
>
> 4. Of making and enforcing rules and regulations governing and restricting the use and supply of water * * *",

is its Department of Water Supply, Gas and Electricity (Greater New York Charter, §469 as amended by L. 1916, Ch. 602, §1), one of the administrative departments of the City of New York (Greater New York Charter, §§96, 100, 468).

The expenses of, or incurred by or through, the Board of Water Supply for salaries, acquisition of real estate, construction of works and for all other purposes are **not** *included in the*

> "budget of the amounts estimated to be required to pay the expenses of conducting the public business of the City of New York * * * for the then next ensuing year * * *" (Greater New York Charter, §226),

———".

† Not even the Treasury Department will assume to say what would be an ample reserve for contingencies such as a huge conflagration, pestilence or other public calamity.

* Charges for water from the public supply are liens against the lands and buildings supplied, of the same grade as real property taxes (Greater New York Charter §§473, 1017). The duty of collecting these charges was transferred by New York City Local Law No. 14 of 1928 to the Comptroller who is the head of the city's department of finance (Greater New York Charter § 67).

but, under the authority and direction of section 33 of the Act (*infra*, p. 47) creating the Board, are paid by the Comptroller of the City of New York through the sale of corporate stock of the city.

"Corporate stock of the city of New York" are the bonds issued by the City of New York on and after January 1, 1898 for the redemption and payment whereof

> "the faith and credit of the City of New York shall be and is hereby pledged. * * * and shall be made redeemable at a period of not more than fifty years from the date thereof * * *." (Greater New York Charter, §169.)

When issued under section 33 of the Act creating the Board of Water Supply of the City of New York (*infra*, p. 47), these obligations are

> "bonds to provide for the supply of water within the meaning of section ten of article eight of the constitution of the state of New York" (*infra*, p. 48),

and are "not included" in the prohibition which said section of the State Constitution makes against the incurrence by any county or city of the State of further indebtedness, after January 1st, 1908, in excess of

> "ten per centum of the assessed valuation of the real estate of such county or city subject to taxation, as it appeared by the assessment rolls of said county or city on the last assessment for State or county taxes * * *."

No activity of the Board of Water Supply of the City of New York looks to the acquisition or earning by it of any moneys for the City or for itself. By it and through

it, staggering amounts of the public moneys are expended. But it gains nothing for the public revenues. Its principal functions are to investigate, to study, to supervise, to police and to inspect. It is possible for the Board to spend millions of dollars of the city's money without more result to the city than that gained by a fire company, not called upon to answer an alarm of fire. Nothing that is done by it is anything short of governmental in its nature, and the salaries of its officers and employees should, therefore, be recognized as free from taxation by the Federal Government.

Conclusion.

The order herein of the United States Circuit Court of Appeals should be reversed and the tax on the petitioner's salary be set aside, but, if that be not done, it should be indicated that the salaries of the officers and subordinates of the Board of Water Supply of the City of New York are not subject to Federal income taxation.

Respectfully submitted,

J. Joseph Lilly,
Attorney for Thaddeus Merriman
and Herman Goldberg,
Amicus Curiae.

Appendix A

New York Laws of 1905, Chapter 724

Section 1. The mayor of the city of New York shall appoint three persons who shall be commissioners for the purposes hereinafter specified. The persons so to be appointed shall be public officers and shall constitute a board or commission to be called the board of water supply of the city of New York. Every member of this board shall during his term of office be a resident of the city of New York. Each of the commissioners shall be entitled to receive a salary of twelve thousand dollars per year and shall hold no other federal, state or municipal office, except the office of notary public or commissioner of deeds. The board shall have the power to appoint a president from among its own members and to adopt a seal and by-laws regulating the transaction of its business. The board shall also have power to select and appoint a secretary, and such engineers, surveyors, draughtsmen, stenographers, clerks and employees as may be necessary, and to fix their compensation and in addition to the powers hereinafter specifically conferred shall have such further powers as may be requisite to the efficient performance of the duties imposed upon it by this act. Two members shall constitute a quorum of said board for the transaction of all business of the board. All contracts and other papers to be executed pursuant to a resolution adopted by the board, may be executed in the name of the board, and under its seal and attested by the signature of its president or secretary or of any member of the board duly authorized by resolution so to do. The corporation counsel of the city of New York shall be the attorney at law for, and legal adviser of, the board, and shall, upon its request, either personally or through such of his assistants or other counsel as he may designate, furnish it with advice and aid, in a similar manner as he

is required by law to do in the case of the departments, boards and officers of the city of New York.* No member of said board shall be removed except for incompetency or misconduct shown after a hearing upon due notice, upon stated charges.

SEC. 2. It shall be the duty of the board to proceed immediately and with all reasonable speed, to ascertain what sources exist and are most available, desirable and best for an additional supply of pure and wholesome water for the city of New York. The board shall make such surveys, maps, plans, specifications, estimates and investigations as it may deem proper in order to ascertain the facts as to the said sources and shall report to the board of estimate and apportionment with recommendations as to what action should in its opinion be taken with reference thereto, so that the board of water supply and the board of estimate and apportionment may be enabled to determine from what source or sources and in what manner the city of New York may best secure an additional supply of pure and wholesome water. It shall not be necessary that the project contemplated by this act shall be acted on by or under one report, or at one time, but it shall be lawful for the said boards to report upon, consider and determine the project in parts or sections from time to time as the said boards may deem fit, so that the city may be able to obtain an additional supply of water from one or more sources before the whole additional supply contemplated may be obtained. If at any time the board of estimate and apportionment shall determine it to be advis-

* This sentence is substantially the same as the one contained in section 255 of the Greater New York Charter which makes the Corporation Counsel, who is the head of one of the administrative departments of the City of New York (Greater New York Charter, §§96, 98) the attorney and counsel for the city, the mayor, the board of aldermen and each and every officer, board and department of the city except as otherwise provided in the charter.

able that the needs of the city with respect to its water supply or with regard to the delivery and distribution of such supply among the several boroughs of the city shall be made the subject of study and investigation, the board of water supply shall forthwith proceed with such studies and investigations and, together with its recommendations, report to the board of estimate and apportionment. Upon receipt of any such report the board of estimate and apportionment may consider and act upon such report in the same manner and with the same authority as provided in this section and in any following sections. (As amended by Section 1, Chapter 314, Laws of 1923.)

SEC. 3. The board of estimate and apportionment upon the receipt of the said report or reports of the board of water supply may adopt, modify or reject the whole or any part of the same, and may cause such surveys to be made, and such further information to be obtained as it shall deem expedient to enable it to act intelligently in the premises. In case of the modification or rejection of the recommendations in said report or reports or any part thereof by the board of estimate and apportionment, the board of water supply in like manner as aforesaid shall prepare and submit to the board of estimate and apportionment a further report or reports, surveys, maps, plans, specifications, estimates and investigations and make such changes and modifications as shall seem proper to the board of estimate and apportionment, and shall continue so to do under the direction of the board of estimate and apportionment, until a map, plan or plans covering the entire work contemplated by this act shall be approved and adopted by the board of estimate and apportionment. The said map, plan or plans may be made and adopted in parts or sections from time to time and may be changed or modified either before or after adoption as the board of estimate and apportionment may deem necessary for the more efficient carrying out of the provisions of this act. • • • A

final map, plan or plans approved and adopted by the board of estimate and apportionment shall be executed in quadruplicate, one of which shall remain on file with the clerk of the board of estimate and apportionment, one shall be placed on file in the office of the board of water supply, one or a certified copy thereof shall be filed in the county clerk's office or register's office of each county in which any of the land affected thereby is situated, and one copy, or a certified copy thereof, shall be filed in the office of the commissioner of water supply, gas and electricity. * * * (As Amended by Section 1, Chapter 314, Laws of 1906.)

SEC. 4. The board of water supply its agents, engineers, surveyors and such other persons as may be necessary to enable it to perform its duties under this act, are hereby authorized to enter upon any land, or water for the purpose of making surveys, examinations or investigations and preparing the maps, plans and reports contemplated by this act, and for the purpose of posting any notices that may be required to be published in like manner.

SEC. 5. After the approval, adoption and filing of a final map, plan or plans described in section three of this act, the board of water supply shall prepare and submit to the board of estimate and apportionment six similar maps or plans of the proposed sites of the proposed dams, reservoirs, aqueducts, sluices, culverts, canals, pumping works, bridges, tunnels, blow-offs, ventilating shafts, filters, and other works of construction and the appurtenances thereof. Upon those maps there shall be laid out and numbered the various parcels of real estate on, over or through which the same are to be constructed and maintained, or which may be necessary for the prosecution of the work authorized by this act, * * *. On said maps the natural and artificial division lines existing on the surface of the soil at the time of the survey shall be delineated, and there shall be plainly indicated thereon of which parcels the fee, and over or

through which parcels the right to use and occupy the same in perpetuity, is to be acquired. The board of estimate and apportionment may adopt, modify or reject said maps in whole or in part and require others to be made instead thereof. The said maps may be made and filed in sections. One or more sections may be determined before the maps of the whole construction are completed. The said sections shall be determined and decided upon previous to the appointment of the commissioners as hereinafter provided for, and shall be so determined that one set of commissioners shall not be appointed upon a section covering more property than can reasonably be passed upon and awards made by said commissioners within the limits of a year from the time of the filing of the oaths, as hereinafter provided. The proceedings hereinafter authorized may in like manner be taken separately in reference to one or more of such sections before the maps of the whole are filed. The work upon one or more of such sections may be begun before the maps of the remaining sections are filed. In case of such rejection the board of water supply shall in like manner, as aforesaid, prepare and submit others, until maps shall be approved by the board of estimate and apportionment covering the entire area required for the construction, maintenance and operation of such aqueducts, dams, reservoirs, culverts, sluices, canals, bridges, tunnels, pumping works, blow-offs, shafts, filters and appurtenances according to the maps, plan or plans, theretofore by the said board of estimate and apportionment approved. The maps when adopted by the said board of estimate and apportionment shall be by said board transmitted to the corporation counsel, with a certificate of such approval written thereon and signed by a majority of the board of estimate and apportionment. (As amended by Section 1, Chapter 525, Laws of 1928.)

SEC. 11. On filing the said oath, in the manner provided in the previous section, the city of New York shall

be and become seized in fee of all those parcels of real estate which are on the maps in the fifth section referred to described as parcels, of which it has been determined that the fee should be acquired; and may immediately or at any time or times thereafter take possession of the same or any part or parts thereof without any suit or proceeding at law for that purpose; provided, however, that before the city of New York takes possession of the same it shall pay to the respective owner or owners of each of said parcels of real estate, a sum of money equal to one-half the assessed valuation of said real property as the same appears upon the assessment roll of the town in which the same is situate for the year next preceding that in which the city of New York becomes seized in fee of each of said parcels of real estate or the city of New York at its option and by agreement with the said respective owner or owners may pay to him or them a sum of money equal to the whole assessed valuation of the said real property as the same appears upon the assessment roll of the town in which the same is situate for the year nineteen hundred and twenty-seven. * * * (As last amended by Section 3, Chapter 525, Laws of 1928.)

SEC. 24. The board of water supply, subject to the approval of the board of estimate and apportionment of the city of New York may agree with the owners and persons interested in any real estate laid down on said maps as to the amount of compensation to be paid to such owners or persons interested for the taking or using and occupying such real estate. And in case any said real estate shall be owned, occupied or enjoyed by the people of this state or by any county, town or school district within this state, such rights, titles, interests or properties may be paid for upon agreement respectively with the commissioners of the land office, who shall act for the people of the state, with a chairman and a majority in numbers of the board of supervisors of any county who shall act for such county,

and with the supervisor and commissioner of highways, of any town who shall all act for such town, and with the trustees of any school district who shall act for such district. The commissioners of the land office shall have power to grant to the said city any real estate belonging to the people of this state, which may be required for the purposes indicated in this act, on such terms as may be agreed on between them and the said board of water supply, always, however, reserving and maintaining the rights of the people and riparian owners to go to the water at any point to which the same may be drawn; and if any real estate of any county, town or school district is required by the city of New York for the purposes of this act, the majority of the board of supervisors acting for such county, or the supervisors of any such town, with the commissioners of highway therein acting for such town, or the trustees of any school district acting for such district, may grant or surrender such real estate for such compensation as may be agreed upon between such officers respectively and the board of water suply.

SEC. 26. Upon the filing of the oath of the commissioners of appraisal in the manner hereinbefore provided, the board of water supply shall, from time to time, as it may determine, prepare and submit to the corporation counsel, forms of contracts and specifications for the doing of the work and the furnishing of the material required to be done and furnished by the said approved plan, or for the doing of such parts of said work and the furnishing of such parts of said materials as it may from time to time determine. The forms of contract, specifications and bonds for the faithful performance shall be subject to approval as to form by the corporation counsel which approval shall be endorsed thereon or attached thereto. The board of water supply is hereby given the exclusive authority to determine what provisions shall be embodied in said contracts.

SEC. 27. When the form of any contract with its specifications and the form of bond for the performance thereof shall have been approved as provided for in the last section, the board of water supply shall advertise for sealed bids or for proposals for the doing of the work or the furnishing of the materials called for in such approved form of contract. Said advertisement shall be published in the City Record and in two daily newspapers published in the city of New York, to be designated by the board of water supply, for at least fifteen days consecutively before the time fixed for the closing of the bid box.

SEC. 28. All bids or proposals which may be sent in answer to the invitation of such advertisement shall be inclosed in a sealed envelope and delivered to the board of water supply or to such person as may be designated by it to receive the same, who shall, upon receipt thereof, forthwith and in the presence of the person offering said bid deposit it in a box provided for the receipt thereof. * * *

SEC. 29. After the expiration of the time limited in the advertisement the said bids or proposals shall be publicly opened by the said board of water supply and it may select the bid or proposal, the acceptance of which will, in their judgment, best secure the efficient performance of the work, or they may reject any or all of such bids. In case of the rejection of all of said bids the said board of water supply shall readvertise said contract, and shall receive and dispose of the bids tendered under such advertisement in the manner hereinbefore provided for. In case any work shall be abandoned by any contractor, or his contract terminated pursuant to the provisions thereof, it shall be readvertised and relet in the manner in this act provided for the original letting of such work.

SEC. 31. The contracts, when so awarded, shall be executed in triplicate by the contractor or contractors on the

one part and the board of water supply acting for the city of New York, on the other part. One of said originals shall be delivered to the contractor, and the other two shall be filed, one in the finance department and the other with the board of water supply. The work and materials called for by said contract shall be done and furnished under the direction and supervision, and subject to the inspection of the board of water supply, its engineers, supervisors and inspectors. No contract shall take effect until the board of water supply or a majority thereof shall certify thereon in writing that its acceptance will, in their judgment, best secure the public interest and the efficient performance of the work therein mentioned. No contract shall take effect until the employer of labor to be engaged in the construction of any of the work in this act provided for, shall give to the municipality in which such labor may be employed, a bond in the penal sum of five thousand dollars condition to save harmless and indemnify such municipality against any loss, expense or charge that said municipality may legally incur because of paupers or indigent employees brought in said municipality and having no settlement therein such bond to be approved by the chief executive officer of such municipality. (As amended by Section 5, Chapter 314, Laws of 1906.)

Sec. 33. The comptroller of the city of New York is hereby authorized and directed to raise from time to time by the issuance of corporate stock of the city of New York, in addition to the amount which he is now authorized to raise for such purposes, such sums of money as shall be sufficient to pay for the salaries of the board of water supply and their subordinates, and for any real estate, or for the extinguishment of any right, title or interest therein acquired, and all damages appraised to persons interested therein, together with all expenses necessarily incurred in surveying, locating and acquiring title to said real estate, or in extinguishing claims for damages thereto and also to

pay for all construction work that may be contracted for and accomplished under this act, and for all other expenses of any nature or kind whatever that may be legally incurred under the provisions of this act. Such corporate stock shall be issued by the comptroller when thereto authorized by the board of estimate and apportionment, without the concurrence or approval of any other board or public body, and as provided in section one hundred and sixty-nine of the Greater New York charter.* Such corporate stock shall be deemed to be bonds to provide for the supply of water within the meaning of section ten of article eight of the constitution of the state of New York,† and in accordance with the provisions of said section a sinking fund shall be created on the issuing of the said corporate stock for its redemption by raising annually by taxation a sum which will produce an amount equal to the sum of the principal and interest of said corporate stock at its maturity. All payments from the proceeds of the sale of such corporate stock shall be made upon proper vouchers and authorizations in accordance with the provisions of this act and with the laws, regulations and practice now in force in regard to the payment of money by the comptroller of the city of New York. (As amended by Section 1, Chapter 438, Laws of 1907.)

SEC. 34. All work hereby authorized to be done and all materials hereby authorized to be furnished involving an expenditure of over one thousand dollars, shall be procured by contract made in the manner required by and

---

* This charter section describes the 50 year bonds of the City of New York and limits the purposes for which they may be issued. The above section 33 extends these purposes to include the operations of the city's Board of Water Supply.

† This is the provision of the Constitution of the State of New York which limits the amount of the indebtedness which may be incurred by any county or municipality, except for water supply and other prescribed purposes.

pursuant to the provisions of this act. The board of water supply, however, may without contract cause such surveys to be made and such maps, plans and estimates to be prepared, as shall, in its opinion, be necessary to carry out the provisions of this act, and may appoint and fix the compensation of suitable engineers and other persons to supervise and inspect all work hereby authorized to be done. The board of water supply may procure any work to be done without contract, not involving an expenditure of over five thousand dollars, if they certify that in their opinion, it is for the public interest, that such work shall be done; and in such certificate they shall state their reasons therefor.

SEC. 35. The city of New York is hereby required to build and construct such highways and bridges as may be made necessary by the construction of any reservoir under this act, and to repair and forever maintain such additional highways and bridges, except such as shall be part of any state route; and in case any bridge or highway thus constructed shall cross any railroad, it shall do so above or below the said railroad and not upon the same level. It shall be the duty of the board of water supply of the city of New York, to provide proper police protection to the inhabitants of the localities in which any work may be constructed under the authority of this act and during the period of construction, against the acts or omissions of persons employed on such works or found in the neighborhood thereof; and to that end the said board is hereby authorized and required to appoint a sufficient number of persons to adequately police the said localities for the said periods. The said board shall also have power to remove such persons and to fix or change their compensation in its discretion, which compensation shall be paid upon a certificate of the said board, by the city of New York, as part of the expense authorized to be incurred by this act.

The said board shall give to each person so appointed a certificate of appointment and certified copies thereof, one of which shall be filed in the office of the sheriff of each county in which any work shall be in process of construction under this act and in which said person shall be authorized to perform his duties. Each of said persons so appointed shall be and have all the powers of a peace officer in the county where any work is being constructed under the authority of this act, and he shall at all times when on duty wear upon his clothing or have in his possession a shield or other suitable badge of authority which he shall at once exhibit to any person asking therefor. It shall be the special duty of the persons so appointed to prevent breaches of the peace and unlawful depredations and to arrest and bring before the proper magistrates persons employed on the said works or found in the vicinity thereof, who are guilty of offenses against the law punishable by death, imprisonment or fines, or persons whom they may have reasonable cause to believe to be guilty of any of such offenses. The sheriff of a county wherein a certificate of appointment of any such person as a peace officer is filed may cancel such certificate for cause, and shall immediately give notice in writing of such cancellation to the board of water supply of the city of New York, specifying the cause of such revocation. Such notice may be given by mail. On such cancellation the authority of such person as a peace officer shall immediately cease. Any expense necessarily incurred by a county, town or city in any criminal action or proceeding against any person employed on any work constructed or in process of construction under this act, or in the suppression of riots among persons employed on said work or in the prevention of the commission of crime by such person, after being duly audited as required by law, shall constitute a claim in favor of such county, town or city against the city of New York, and an action may be maintained on

such audit as for money paid to the use of the city. The plans and specifications for any highways required to be constructed under the provisions of this section shall be approved by the state department of public works. (As last amended by Section 5, Chapter 525, Laws of 1928.)

SEC. 35-a. The board of water supply shall make such reasonable rules and regulations, not in conflict with the highway law of the state of New York, as may be necessary to prevent improper and destructive use of highways and bridges constructed under the provisions of this act; provided, however, that the board of water supply shall have no greater authority in respect thereto, than is now, or may hereafter be, vested by the highway law of the state of New York in the town, county or state authorities in relation to the construction and regulation of town, county and state highways. Any individual or corporation failing to observe such rules and regulations shall be guilty of a misdemeanor and in addition shall be liable for actual damages to said highways and bridges to be recovered by the city of New York. (Added by Section 1, Chapter 478, Laws of 1914.)

SEC. 36. The board of water supply shall in every calendar month file in the office of the comptroller of the city of New York an account of any expenses made by it, or under its authority, and of all liabilities incurred by it during the preceding month and an abstract of each such account shall be published in the City Record.

SEC. 40. Immediately after the passage of this act, it shall be lawful for any of the municipal corporations or water districts in the counties of Ulster, Greene, Delaware, Schoharie, Sullivan, Orange, Westchester and Putnam, to take and receive from any of the reservoirs, aqueducts, conduits, streams or pipes of the city of New York, a supply of water for the uses and purposes of the said munici-

pal corporations or water districts and to that end said municipal corporations or water districts are, and each of them is, authorized and empowered to lay the necessary mains, pipes, valves, hydrants, supply pipes and other necessary appurtenances for the use of said water, without the consent of any board, officer, bureau, or department of the state or any subdivision thereof. The connections with said reservoirs, aqueducts, conduits, streams or pipes shall be made at the expense of said municipalities or water districts, and they shall pay to the city of New York such fair and reasonable water charges or rates as may be agreed upon between the proper officer in charge of the water supply of the city of New York* and the authorities of such municipal corporations or water districts or as from time to time upon the application of either party shall be fixed by the water power and control commission,† which commission is hereby given power to fix such fair and reasonable charges or rates after hearing all parties interested. Such charges or rates shall not, however, exceed the charges or rates now charged by the city of New York to persons using water in that city. Such fair and reasonable charges or rates shall be determined on the basis of the actual total cost of the water to the city of New York after deducting from said total cost all construction costs and expenses of operation, maintenance and carrying charges incurred within the corporate limits of the city of New York in connection with the distribution and delivery of the water within said limits. Such charges or rates fixed by the water power and control commission shall be subject to review by the supreme court. Any such municipal corporation or water district desiring to take and receive water under the provisions of this section shall make appli-

---

* The officer here referred to is the Commissioner of Water Supply, Gas and Electricity of the City of New York (Greater New York Charter, §469, *supra*, pp. 35-36).

† This is the body whose duties and functions are described in the Conservation Law of the State of New York.

cation to the proper officer in charge of the water supply of the city of New York in writing, showing the place and manner in which it is proposed to make said connections, which said officer in charge of the water supply of the city of New York shall have exclusive jurisdiction in the premises, to the exclusion of any other board, officer, bureau or department of the state or any subdivision thereof. It shall be the duty of the said officer to grant a permit or authorization for the said connections, under reasonable rules and regulations, including the installation of proper meters or other devices for ascertaining the quantity of water thus taken. The daily quantity of water which may be taken and received by any municipal corporation or water district under the provisions of this section shall not exceed the quantity calculated by multiplying the number of its inhabitants as shown by the last preceding census of the United States or the last state or official municipal census by the daily per capita consumption in the city of New York. (As last amended by Section 6, Chapter 525, Laws of 1928.)

SEC. 41. It shall be lawful for any municipal corporation or other civil division of the state within the watersheds of Esopus creek, the Rondout creek or the Catskill creek, in the counties of Ulster and Greene, at its own expense, to construct a pipe line or aqueduct connecting with any reservoir constructed therein under the provisions of this act, for the purpose of supplying water to such municipal corporation or other civil division of the state. * * *

SEC. 44. The board of water supply is hereby authorized and empowered to provide suitable offices and conveniences for the transaction of its business and to provide proper and needful furniture and safes for the safekeeping of its documents, and to incur other necessary expenses suitable and proper to enable it to carry out the provisions of this act.

SEC. 46. The city of New York shall have no power to acquire, take or condemn lands under this act unless maps and plans covering the work contemplated by this act shall have been submitted to and approved by the state water supply commission. All amendments or modifications of such maps and plans thereafter made shall be in like manner submitted to and approved by said board, and when so approved, shall have the same force and effect as the original plans filed with said board.

INDEX

	PAGE
Statement	1
Questions Presented	1
Argument	2
I. The general test evolved by this Court for determining the constitutional immunity of an employee of a state instrumentality from federal taxation is well defined	3
II. This Court has already decided in *Ashton* v. *Cameron County Water Improvement District,* 298 U. S. 513, that the supplying of water by a municipal corporation is a governmental function constitutionally immune from interference by the Federal Government	4
III. A long history shows that the supplying of water is a usual and traditional governmental function	10
IV. The facts show that in both ancient and modern urban centers only the government can adequately supply water	16
V. The history, powers and functions of the New York City Department of Water Supply demonstrate that it performs not only usual governmental functions, but functions which only the sovereign can adequately perform	24
1. History	24
2. The powers and function of the New York City Department of Water Supply, Gas & Electricity	31
Conclusion	35

Table of Cases.

	PAGE
Ambrosini v. United States, 187 U. S. 1	9
Ashton v. Cameron County Water Imp. Dist., 298 U. S. 513	2, 3, 4, 5, 6, 7, 8, 9
Baltimore Nat'l Bank v. State Tax Comm., 297 U. S. 209	7
Collector v. Day, 11 Wall. 113	5
Columbus v. Mercantile Trust Company, 218 U. S. 645	20, 21
Flint v. Stone Tracy Co., 220 U. S. 107	3
Helvering v. Powers, 293 U. S. 214	3
Hopkins Federal Savings & Loan Ass'n v. Cleary, 296 U. S. 315	7
Indian Motocycle Co. v. United States, 283 U. S. 570	5
Matter of Trustees of Union College, 129 N. Y. 308	9
McCulloch v. Maryland, 4 Wheat. 316	7
McGovern v. City of New York, 229 U. S. 363	33
Metcalf & Eddy v. Mitchell, 269 U. S. 514	1
New Jersey v. New York, 283 U. S. 336	22, 24, 31, 33
New York City v. Pine, 185 U. S. 93	33
New York ex rel. Rogers v. Graves, 299 U. S.	8
N. Y. University v. American Book Co., 197 N. Y. 294	9
People ex rel. City of Amsterdam v. Hess, 157 N. Y. 42	23
Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429	9
Remsen v. Wheeler, 105 N. Y. 573	9
United States v. California, 297 U. S. 175	7
United States v. Railroad Co., 17 Wall. 322	5, 9

Constitution of the State of New York.

Art. I, Sec. 6	32
Art. III, Sec. 1	18
Art. VII, Sec. 7	22
Art. VIII, Sec. 10	8

Statutes Cited.

	PAGE
Act of Parliament (33 Henry VIII c. 35)	15
Greater New York Charter:	
Secs. 151-b, 473, 920, 921, 1027	9
208, 226-c, 227	9
255, 453, 468	31
450, 468-532	8, 31
469, 472, 479	32, 33
563	33
National Bankruptcy Act (U. S. Code, title 11, Secs. 301-303)	5
New York Conservation Law, Secs. 533, 540	22
N. Y. Public Health Law, Secs. 70, 71	18
N. Y. Tax Law, Sec. 6, sub. 8	34
N. Y. Transportation Corporation Law, Sec. 81	34
Session Laws of the State of New York:	
Laws of 1741, ch. 719	25
Laws of 1833, ch. 36	29
Laws of 1834, ch. 256	18, 29
Laws of 1842, ch. 150	34
Laws of 1844, ch. 315	34
Laws of 1849, ch. 187	34
Laws of 1865, ch. 249	34
Laws of 1884, ch. 292	18
Laws of 1893, ch. 189	18
Laws of 1893, ch. 670	18
Laws of 1901, ch. 466	8
Laws of 1905, ch. 724	30
Laws of 1933, ch. 563	33
Texas Statutes, Title 128, ch. 2, Articles 7750, 7762, 7776, 7792	5

Departmental Documents.

PAGE

Annual Report of Department of Water Supply, etc. (N. Y. City) for 1935 ..... 9, 31

Board of Aldermen, Document 61, Nov. 10, 1832, pp. 194, 195 ..... 29, 30

General Report of the Catskill Water Supply System, Board of Water Supply of the City of New York (1936), p. 4 30

Minutes of the Common Council of the City of New York, Vol. I, p. 46 25

Minutes of the Common Council of the City of New York, Vol. II, pp. 497-498 18

Minutes of the Common Council of the City of New York, Vol. VIII, pp. 26, *et seq.* 26

Records of New Amsterdam, Vol. 7, p. 190 24

State Department Reports (Vol. 55, p.) February 20, 1936 ..... 31, 33

Miscellaneous Authorities Cited.

American Water Works Journal, Vol. 3 (1916), pp. 259, 305 19

Babbitt, Sewerage and Sewage Treatment 22

Bible References, II Kings, XVIII, 17 and XX, 20; II Chronicles, XXXII, 30; and Isaiah, VII, 3 ..... 10, 21

Bye & Hewett, Applied Economics, 1929 (p. 438) 17

Century of Municipal Progress 16, 17

Chadwick's Report on the Sanitary Condition of the Labouring Population of Great Britain (1842) 18

Cyclopedia of American Government, Vol. 3, p. 660 18

Encyclopaedia Americana 17, 21, 22, 24

Encyclopaedia Britannica 17, 21, 34

Encyclopaedia of Education 34

PAGE

Encyclopaedia of the Social Sciences 17, 18, 19, 22
Frontinus, De Aquis Urbis Romae 10
Frontinus, Stratagems and the Aqueducts of Rome 10

Gras, An Introduction to Economic History (1922) 20

Hall, The Catskill Aqueduct (1918) 21, 24, 25, 26, 27, 28, 29, 30
Haswell's Reminiscences 28
Herschel's Translation of Frontinus' "De Aquis" 10, 11, 12, 13, 14, 15
History of the Origin and Progress of the Water Supply of Manchester (1851) 20

Leavitt, The American City (May, 1914) 22
Leonard's History of the City of New York 34
Lossing's History of the City of New York 34

Michael & Will, Law Relating to Gas and Water Undertakings 16
Mortality Statistics, Department of Commerce 19
Municipal Index (1929) 5, 16
Munro, Government of the United States (3rd Ed., 1932) 18, 22

National Civic Federation Report, Part I, Vol. 1 21

Prescott, Greater London's Water Supply (The Municipal Journal, February 1, 1935), Vol. XLIV, No. 2192, pp. 173-4 16

Royal Commission on the State of Large Towns, 1843-1845 20

Thompson, Public Ownership 19

Water Engineer's Handbook and Directory (1931) 17
Water Supply Statistics of American Municipalities (2d Ed., 1929) 16
Webb, Statutory Authorities 20
Webb (S. & B.), English Local Government, the Manor and the Borough 16
Wegmann's Water Supply of the City of New York (1896) 15, 19, 24, 25, 26, 28, 29
Wells & Huxley, The Science of Life (1934) 18
World Almanac 16

Supreme Court of the United States

October Term, 1936—No. 451

WILLIAM WHITLOCK BRUSH,
Petitioner,

against

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

BRIEF OF *AMICUS CURIAE* ON BEHALF OF THE CITY OF NEW YORK, IN SUPPORT OF REVERSAL.

Statement.

The issue presented is whether the salary of the Chief Engineer of Water Supply of New York City is constitutionally exempt from the imposition of a federal income tax. It was conceded by the respondent that the petitioner was an employee of the City of New York (R. 20); cf. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514. Thus, only two principal questions are presented. One—the sole question raised by respondent—is whether the supplying of water to the City of New York is a governmental function (R. 20). The other is: does the tax place an unconstitutional burden upon the sovereign taxing and borrowing functions of the State and City of New York?

The Circuit Court of Appeals, affirming the decision of the Board of Tax Appeals, denied the claimed exemption (R. 43-49, 85 F. [2d] 32). This Court granted a writ of certiorari, 299 U. S. (November 16, 1936).

The relevant facts will be detailed in the argument.

Summary of Argument.

I. The general test evolved by this Court for determining the constitutional immunity of an employee of a state instrumentality from federal taxation is well defined.

II. This Court has already decided in *Ashton* v. *Cameron County Water Improvement District*, 298 U. S. 513, that the supplying of water by a municipal corporation is a governmental function constitutionally immune from interference by the Federal Government.

III. A long history shows that the supplying of water is a usual and traditional governmental function.

IV. The facts show that in both ancient and modern urban centers only the government can adequately supply water.

V. The history, powers and functions of the New York City Department of Water Supply demonstrate that it performs not only usual governmental functions, but functions which only the sovereign can adequately perform.

ARGUMENT.

POINT I.

The general test evolved by this Court for determining the constitutional immunity of an employee of a state instrumentality from federal taxation is well defined.

The general legal doctrine applicable to this case is so clear and well established that it requires only the briefest mention. At one time, this Court held immune from federal taxation only "those operations of the States essential to the execution of its governmental functions and which the State can only do itself". *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172. This Court has abandoned this "essential" governmental test. *Helvering* v. *Powers*, 293 U. S. 214. The present test of immunity of a State instrumentality from federal taxation is whether it is engaged in a "usual governmental function". *Helvering* v. *Powers*, *supra*, pp. 224, 225.

What is or is not a "usual governmental function" is primarily a question of fact—a question to be determined by history, by tradition and by what governments generally and actually do. In the main, this brief will show that governments have owned and operated, and do now usually own and operate, their water supply systems. It will also attempt to indicate some of the facts and reasons why only the sovereign can adequately supply water in urban centers if it is properly to execute its basic function of preserving the foundation of its sovereignty—the continued existence and proper health of its people. The only case which will be discussed at length is *Ashton* v. *Cameron County Water Improvement District*, 298 U. S. 513 (*infra*, Point II).

POINT II.

This Court has already decided in *Ashton v. Cameron County Water Improvement District,* 298 U. S. 513, that the supplying of water by a municipal corporation is a governmental function constitutionally immune from interference by the Federal Government.

According to our reading of the opinions of this Court in the *Ashton* case, all of the members of the Court were agreed that the supplying of water by the Cameron County Water Improvement District was a governmental function immune from interference and taxation by the federal government.

The second amended petition in the *Ashton* case contains the following allegations: (1) the petitioner was created in 1914 as Cameron County Irrigation District Number One; and in 1919 was converted into Cameron County Water Improvement District Number One; (2) the petitioner was created for the purpose of furnishing water for irrigation and *domestic* purposes; (3) under the Constitution and laws of Texas, the petitioner was granted the express and full power to perform the proprietary and/or corporate function of furnishing water for irrigation and domestic uses (Paragraph I of Second Amended Original Petition). These allegations were contested (Paragraph II, Contest to Petition).

In its motion for a new trial in the *Ashton* case, the petitioner alleged that the District Court erred in holding that it was created for the purpose of performing "governmental functions", for the reason that the Courts of Texas, as well as the other Courts in the Nation, had uniformly held that the furnishing of water was a purely

proprietary function (Paragraphs III, IV and V). Similar allegations were made by the petitioner in its Assignments of Error (Paragraph IX).

The opinion of the majority of this Court in the *Ashton* case pointed out that the respondent was organized "to furnish water for irrigation and domestic uses" (298 U. S., at p. 527). The fact is that the Cameron Water District supplies all of the water for domestic purposes to about 14,000 people and charges for the water on an annual, acreage or meter basis (*Municipal Index* [1929] p. 448; Texas Statutes, Title 128, Chapter 2, Articles 7750, 7622, 7776, 7792).

In holding that the bankruptcy act of Congress approved May 24, 1934 (U. S. Code, tit. 11, §§ 301-303, added by 48 Stat. 798) was unconstitutional, Mr. Justice McReynolds pointed out (pp. 527-528) that: (1) the petitioner is "a political subdivision of the State, created for the local exercise of her sovereign powers, and that the right to borrow money is essential to its operations"; (2) under the doctrine of *Collector* v. *Day*, 11 Wall. 113; *Indian Motocycle Co.* v *United States*, 283 U. S. 570; *United States* v. *Railroad Co.*, 17 Wall. 322, and similar cases, Congress, notwithstanding its broad grant of power "to lay and collect taxes" could *not "levy any tax on the bonds issued by the respondent or upon income derived therefrom. So to do would be an unwarranted interference with fiscal matters of the State—essential to her existence";* (3) since the power of the Congress "To establish * * * uniform laws on the subject of Bankruptcies" is of no higher rank or importance than its power "to lay and collect taxes", there is "no reason for saying that one is impliedly limited by the necessity of preserving the independence of the States, while the other is not"; (4) the Court's special concern was "with the existence of the power claimed—not merely the im-

mediate outcome of what has already been attempted" and it therefore considered it of first importance "that due attention be given to the results which might be brought about by the exercise of such a power in the future"; (5) "If obligations of States or their political subdivisions may be subjected to the interference here attempted, they are no longer free to manage their own affairs; the will of Congress prevails over them; although inhibited the right to tax might be less sinister. And really the sovereignty of the State, so often declared necessary to the federal system, does not exist".

The opinion of the minority of the Court in the *Ashton* case was also based upon the assumption that the Cameron County Water Improvement District was a governmental unit performing sovereign-governmental functions, and immune from federal taxation. The minority reached a different result because it was of the opinion that in the light of the facts, the history of the bankruptcy legislation and the decisions of this Court, a voluntary petition of a municipal corporation, consented to by the State, did not unconstitutionally disturb the balance between the powers of the states and the powers of the Federal government. Thus, Mr. Justice CARDOZO, in writing for the minority of the Court, said (pp. 538, 540):

> "A situation such as this would call very clearly for the exercise by a court of bankruptcy of its distinctive jurisdiction if the debtor were a natural person or a private corporation. Is there anything in the position of a *governmental unit* that exacts a different conclusion?
>
> The question is not here whether the statute would be valid if it made provision for involuntary bankruptcy, dispensing with the consent of the state

and with that of the bankrupt subdivision. For present purposes one may assume that there would be in such conditions a dislocation of that balance between the powers of the states and the powers of the central government which is essential to our federal system. Cf. *Hopkins Federal Savings & Loan Assn.* v. *Cleary,* 296 U. S. 315; *United States* v. *California,* 297 U. S. 175. To read into the bankruptcy clause an exception or proviso to the effect that there shall be no disturbance of the federal framework by any bankruptcy proceeding is to do no more than has been done already with reference to the power of taxation by decisions known of all men. *McCulloch* v. *Maryland,* 4 Wheat. 316. The statute now in question does not dislocate the balance. It has been framed with sedulous regard to the structure of the Federal system.

* * * * * * *

Sufficient reasons do not appear for excluding political subdivisions from the bankruptcy jurisdiction if the jurisdiction is so exerted as to maintain the equilibrium between state and national power. Persuasive analogies tell us that consent will preserve a balance threatened with derangement. A state may not tax the instrumentalities of the central government. It may do so, however, if the central government consents. *Baltimore National Bank* v. *State Tax Commission,* 297 U. S. 209. Reciprocally, the central government, consent being given, may lay a tax upon the states. Cf. *United States* v. *California, supra.* * * * *The prevailing opinion tells us in summing up its conclusions that the bankruptcy power and the taxing power are subject to like limitations when the interests of a state are affected by their action.* Let that test be applied, and the Act must be upheld, for jurisdiction is withdrawn if the state does not approve." (Italics ours.)

In the briefs submitted to this Court on the petition for rehearing in the *Ashton* case, one of the main issues again presented was whether the Cameron County Water Improvement District was organized for and performed a governmental function as contrasted with a proprietary function (Point I of both briefs). This Court denied the petition for rehearing, 299 U. S. ; (October 12, 1936).

From the detailed facts set out *post*, Point V, it will be seen that the New York City Water Supply System is more of a governmental unit, and performs more governmental functions, than the Cameron County Water Improvement District. For present purposes, a brief comparison will suffice. The Department of Water Supply, Gas and Electricity is not a separate water district. It is a constituent part of the municipal government of the City of New York (Greater New York Charter [L. 1901, ch. 466, as amended] §§ 450, 468-532). It supplies water for fire protection, sewage disposal, public buildings and baths, public parks and street cleaning (R. 21). Like the Cameron County Water Improvement District, it also supplies water for domestic uses. "The primary purpose of the enterprise being legitimately governmental, its incidental use for private purposes affords no ground for objection". *New York ex rel. Rogers* v. *Graves*, 299 U. S. (January 4, 1937). Bonds of a municipality for its water supply are specifically excluded by the State Constitution from the municipalities' debts for the purposes of determining their debt limits (N. Y. Const., Art. VIII, § 10). The City's existing bonded indebtedness on December 31, 1935, for its water supply system was $375,583,368.10 (Annual

Report for 1935, City of New York, Department of Water Supply, Gas & Electricity, Table 15). The salaries of the employees of the Department of Water Supply, Gas & Electricity, as well as the interest and sinking fund charges on the bonded indebtedness, are paid out of the general tax levy budget (R. 22, 23; Greater New York Charter §§ 208, 226-c, 227). The revenues in this budget result from real property taxes as well as water charges (Greater New York Charter, §§ 920, 921). These revenues are not earmarked for expenditures; they are commingled in the general tax levy budget (Greater New York Charter §§ 151-b, 920, 921). In fact, the salaries of employees of the Department of Water Supply are paid in part from real property taxes and in whole from the general tax levy budget (R. 22, 23; Greater New York Charter §§ 226-c, 920, 921). The water revenues themselves become a lien when due and have sufficient other attributes of sovereignty to have been held to be a tax (Greater New York Charter, § 473; *Remsen* v. *Wheeler,* 105 N. Y. 573; *Matter of Trustees of Union College,* 129 N. Y. 308). Water charges in arrears are included as items in tax sales (Greater New York Charter, §§ 1027 *et seq.*) The obligation to pay for water "is created by the taxing power of the local authorities" *N. Y. University* v. *American Book Co.,* 197 N. Y. 294, 297.

Thus, as in the *Ashton* case, the tax in question here would not only place an unconstitutional burden upon the governmental function of supplying water, but it would also burden the sovereign taxing and borrowing power of the City of New York. Cf. *United States* v. *Railroad Co.,* 17 Wall. 322; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; *Ambrosini* v. *United States,* 187 U. S. 1.

POINT III.

A long history shows that the supplying of water is a usual and traditional governmental function.

The construction, control and operation of water supply systems by the sovereign are such ancient and well-known facts of history that full repetition seems unnecessary.

One of the earliest aqueducts was the one built by Hezekiah (King of Judah, 720-689 B. C.) to supply Jerusalem with water. Hezekiah changed an overhead to an underground tunnel in anticipation of an attack from the Assyrians (II Kings, XVIII, 17, and XX, 20; II Chronicles, XXXII, 30; and Isaiah, VII, 3).

Although the governmental construction of aqueducts had been carried on in Greece and the older civilizations of Asia for centuries, probably the best known example of the ancient governmental control and supplying of water is that of the Romans. The detailed story of the early Roman water supply system is well told by SEXTUS JULIUS FRONTINUS, *De Aquis Urbis Romae.* See HERSCHEL, *The Two Books on the Water Supply of the City of Rome of Sextus Julius Frontinus, Water Commissioner of the City of Rome, A. D. 97* (2nd Ed. 1913, Longmans, Green & Co.); FRONTINUS, *Stratagems and the Aqueducts of Rome* (1925, Loeb Classical Library).

"Inasmuch", said FRONTINUS, "as Nerva Augustus, an emperor of whom it is difficult to say whether he devotes more love or more diligence to the common weal, has now conferred upon me the duties of water commissioner, (or water works superintendent, *curator aquarum*), duties contributing partly to the convenience, partly to the health, even to the safety of the city, and from olden time exercised by the most distinguished citizens; I therefore consider it

to be the first and most important thing to be done, as has always been one of my fundamental principles in other affairs, to learn thoroughly what it is that I have undertaken." (HERSCHEL, *op. cit.*, p. 3.)

After thus giving the reason for writing his books, FRONTINUS summarized what he was going to write as follows:

> "3. And that I may not by chance omit anything which is necessary for the understanding of the whole subject matter, I will first put down the names of the waters which are brought to the city of Rome; then by what persons, and under what consuls, and in what year since the founding of the city each of them was brought in; then at what places and at what mile-stones their aqueducts commence; how far they were carried in underground channels, how far on masonry substructures, and how far on arches; then the height of each of them, and the size and number of taps, and what uses are dependent upon them; how much each aqueduct brings to each ward without the city, and how much within the city; how many public delivery tanks there are, and how much is delivered from them to the places of public amusement, how much to the ornamental fountains (*munera*)—as the more educated call them—how much to the water basins, how much to the use of the State (in the name of Caesar), how much for private uses by grants from the emperor; what is the law with regard to the construction and maintenance of the aqueducts; what penalties enforce it under the laws, votes of the Senate, and Imperial edicts that have been enacted." (HERSCHEL, *op. cit.*, p. 5.)

From a reading of FRONTINUS, the following of many phases of and reasons for governmental construction, operation and control of the water supply system appear: Until 331 B. C., the Romans used water which they drew

from wells, springs or the Tiber (HERSCHEL, p. 5). But as the City and its needs for water grew the aqueducts were constructed by the government to carry water from afar (HERSCHEL, pp. 5, 7, 9). Detailed laws, ordinances and regulations were enacted to safeguard the water supply from diversion, exhaustion, interference and pollution, to condemn private lands for the water supply, and to provide for the repairs of the aqueducts and the allocation of the water supply to afford a continuous supply (HERSCHEL, p. 65). So, too, because water was a vital natural resource, the sovereign had to stop its diversion and exhaustion by the water-men for profit (HERSCHEL, pp. 13, 61).

FRONTINUS inquired into the law with regard to conducting and maintaining the waters and said:

> "In examining in ancient writings what was said in detail in these matters in the laws that had been enacted, I found some things different with our forefathers. With them all water was held for the public use, and the law was as follows: *No private person shall conduct other water than that which flows from the basins onto the ground.* For these are the words of the law referring to water which overflows from the troughs,—we call it lapsed water;* and even this was not granted for any other use than for bathing establishments and for fulling-mills; and it was subject to a tax, for a consideration had to be paid for it, which was turned into the public treasury. Some water was conceded to the houses of the principal citizens, in case the others made no objection.
>
> "95. To which authorities belong the right to grant water or to sell it is variously given in those laws, for at times I found it was left to the aediles, at other times to the censors; but it seems that as often as there were censors in the government these grants were sought from them; if there were none,

* That is, water the private right to which has become void.

then the aediles had the power referred to. It is plain from this how much more our forefathers cared for the general good than for private luxury, inasmuch as they caused the State to derive profit even from that water which was conducted to private parties.

"96. The maintenance of the several aqueducts, as I found, was let out to contractors, and they were to employ a definite number of workmen on the aqueducts outside the city, and another definite number within the city; in doing this they had to enter in the public records the names of those whom they intended to employ in the service for each ward of the city; and the duty of inspecting their work devolved at times on the aediles and censors, and at times on the quaestors,* as may be seen from the vote of the Senate which was passed in the consulate of C. Licinius and Q. Fabius.

"97. How much care was taken that no one should injure the conduits, and that no one should draw water that had not been granted, may be seen, among other ways, from the fact that the Circus Maximus could not be watered, even on the days of the Circensian Games, except with the permission of the aediles or censors; which regulation, as may be read in the writings of Ateius Capito, was still in force even after the care of the waters had passed, under Augustus, to commissioners; but lands of which it could be proven that they had been irrigated unlawfully from the public supply were confiscated. A tenant, one of whose slaves infringed the law, even without the knowledge of his master, was punished by a fine. By the same laws it is also enacted as follows: *No one shall with malice pollute the waters where they issue publicly. Should any one pollute them, his fine shall be ten thousand sestertii.*† There

* Jordan, i. I. 408. The quaestor Aemilius built the first stone bridge. There is a *denarius* showing it. Cohen, *T.* 1 *Aem.* 3.

† At that time about two hundred and ninety-two dollars of coin.

fore the order was given to the Curule aediles to appoint two men in each district from the number of those who lived in it, or owned property in it, in whose care the public fountains should be placed.

"98. The first permanent water commissioner was M. Agrippa. He, as one might say, was commissioner mainly of works which he himself had called into existence. This was after his aedileship; and before his aedileship had come his consulship. Inasmuch as the amount of water now available warranted it, he determined how much should be allotted to the public structures, how much to the basins, and how much to private parties. He also kept his own private gang of slaves for the maintenance of the aqueducts and delivery tanks and basins. This gang was given to the State as its property by Augustus, who had received it in inheritance from Agrippa." (HERSCHEL, *op. cit.*, pp. 65, 67, 69; italics in original.)

In FRONTINUS' time "As concerns the draft of water by private consumers, there is to be noted: *that no one shall draw water without a writing from Caesar, that is, that no one shall draw water from the public supply without a license, and no one shall draw more than has been granted.* By this means, we propose to make it possible that the quantity of water, concerning whose recovery we have spoken, may be distributed to new fountains and may be used for new grants from the sovereign". (HERSCHEL, *op. cit.*, p. 75, cf. p. 77; italics in original.)

The proportion of public and private use of water for drinking, public fountains and sewage disposal, was substantially the same in early Roman days as it is in New York City today (HERSCHEL, pp. 53, 55, 58, 59, 81; and see R. 21).

Summarizing the effect of the increased governmental care in handling the water supply, FRONTINUS said:

> "The effect of this care * * * will be felt still more in the improved health of the city, as a result of the increase in the number of the tanks, reservoirs, fountains, and water-basins. No little advantage accrues also to private consumers from the increase in number of private grants; and those who with fear drew water unlawfully, draw their supply now free from care, by grant from the sovereign. Not even the waste water is lost; the cleanliness of the city, too, is greatly improved; the air is purer; and the causes of the pestilence, which gave the air of the city so bad a name with the ancients, are now removed" * (HERSCHEL, *op. cit.*, p. 61).

The Roman experience in the construction, control and operation of the water supply system has also been the experience in New York and other large and growing cities (WEGMANN, *Water Supply of the City of New York*, 1658-1895 [1896]; and see Point IV, *post*).

England affords a more modern instance of the governmental construction and control of water supply systems. In England water systems were built, owned and operated by local governmental authorities long before the Federal Constitution was drafted. One of the earliest statutes on the subject was the Act of 1541 which empowered the Mayor and Dean of Gloucester to provide a water supply (33 Henry VIII, c. 35). Southampton, Hull, Bath and Plymouth, for example, had governmentally operated water supply systems in the fifteenth and sixteenth centuries; Rye and Oxford established municipal operation in the seventeenth century;

---

* See H. Jordan, in Hermes, 14 (1879), 269. Also, the same in Topogr. i. I, 149, note 45.

and prior to 1835, Alnwick, Berwick, Bristol, Coventry, Penzance and Leeds had municipally operated water systems (S. & B. Webb, *English Local Government. The Manor and the Borough*, pp. 193, 407, 409, 419, 431, 448, 514). The London water supply system, which is municipally operated, is faced with many of the same problems as are present in New York City. Prescott, *Greater London's Water Supply*, The Municipal Journal, Vol. XLIV, No. 2192, pp. 173-174 (London, Feb. 1, 1935). Today, most of the population of England is served by municipal water systems. Michael & Will, *The Law Relating to Gas & Water Undertakings* (7th ed.), vol. ii, p. 1; *A Century of Municipal Progress, 1835-1935*, p. 319.

POINT IV.

The facts show that in both ancient and modern urban centers only the government can adequately supply water.

All of the twenty largest cities in the United States have municipally operated water supply systems. In other words, every city in the United States with a population of over 375,000 has a municipal water supply system. With the exception of Indianapolis and Birmingham, the forty-nine largest cities in the United States have governmentally operated water systems (Financial Statistics of Cities, 1934 Census Bureau, World Almanac, pp. 282 *et seq.;* Water Supply Statistics of American Municipalities [2nd ed., 1929]; Municipal Index [1929] pp. 371-459). The City of Birmingham has an option to buy, and is working on plans to take over the water supply system. The exception of Indianapolis is explainable in large part by the geological

fact that it is virtually the only comparatively large city in the world which obtains practically all of its water from within its own geographical limits (Municipal Index [1929] p. 390). Differently stated, every city in the United States with a population of over 168,000 with the exception of Birmingham and Indianapolis, has a municipally owned water system.

Substantially the same condition prevails abroad to-day, and prevailed in the large ancient cities (BYE & HEWETT, *Applied Economics* [1929] p. 438; *A Century of Municipal Progress, 1835-1935* [London, 1935] p. 319; *Encyclopaedia Britannica* (14th ed.) vol. 17, p. 292, vol. 19, p. 466. Virtually all of the water undertakings in Canada, South Africa, New Zealand, Queensland, Victoria, New South Wales and Australia are governmentally operated. *Water Engineer's Handbook and Directory* (1931) pp. 309-319. "At present virtually every large city in the world is supplied with water by public enterprise. A city must have an abundant supply of water whether this can be made commercially profitable or not. The capital investment is very large and social and sanitary reasons call for the sale of water at low rates. Furthermore, the city is always a large user of water for public purposes, and a 'stand by' service—a surplus over the needs for all other purposes—must be maintained for fire protection. All these considerations have prevailed to make water supply a public business" (*Encyclopaedia of the Social Sciences*, tit. "Water Supply" Vol. XV, pp. 373-374).

Of all the public utilities, water supply is the only one which in both ancient and modern times has generally been governmentally operated. (Cf. Vol. 19, *Encyclopaedia Americana*, pp. 579, 580; MUNRO, *The Government of the United States* [3rd ed., 1932] pp. 721, 722.) There are many

reasons why this is so. Briefly summarized, some of the reasons are as follows:

1. Public Health.

The protection of the public health in large cities dictates the government operation of the water supply system (*Cyclopedia of American Government,* Vol. III, p. 660). "In its relation to public health the city's water supply is manifestly of supreme consequence, and that is the chief reason for taking it directly under public control." (Munro, *op. cit.*, p. 721.) The protection of the water supply in urban centers requires costly processes of purification, careful supervision of the water supply at its sources and throughout its system, and continuous testing to prevent the transmission of communicable diseases. *Cf.* N. Y. Const., Art. III, § 1; L. 1884, ch. 292; L. 1893, ch. 189; L. 1893, ch. 670; N. Y. Public Health Law §§ 70, 71. It is common knowledge that there is often a direct connection between the water supply and the transmission of such diseases as typhoid and cholera. Wells & Huxley, *The Science of Life* (1934), pp. 920-921, 1036-1037; *cf.* Minutes of the Common Council, January 21, 1799, Vol. II, pp. 497-498 (New York City).

Chadwick's *Report on the Sanitary Condition of the Labouring Population of Great Britain* in 1842 initiated a world-wide movement for an adequate water supply and sewerage which achieved substantial results in the decrease of cholera and typhoid fever (*Encyclopaedia of the Social Sciences,* Public Health, pp. 647 *et seq.*). The first of the laws (Chap. 256, Laws 1834) which enabled the City of New York to go outside of its boundaries and into the territories of other political subdivisions for the purpose

of securing water was a direct result of the frightful ravages of cholera in the summer of 1832 and the failure of the Manhattan Company which had been chartered in 1799 for supplying the City of New York with pure and wholesome water (WEGMANN, *Water Supply of City of New York,* pp. 19, 21).

For a long time, the death rate from typhoid was higher in those communities in the United States which had privately owned and operated water systems than it was in communities having municipal water works (THOMPSON, *Public Ownership,* p. 208; *American Water Works Journal,* Vol. 3 [1916] pp. 259, 305), though to-day most privately owned systems have learned enough from the example of municipally operated systems to eliminate any discrepancy (THOMPSON, *op. cit.,* pp. 208-209). What is true, however, is that the typhoid death rate for the country as a whole has dropped tremendously in the last generation (*Encyclopaedia of the Social Sciences,* Vol. XII, p. 649; *Mortality Statistics,* Dept. of Commerce). It was during this period that many of our cities went through stages of rapid growth and shifted from private to municipal water systems (THOMPSON, *op. cit.,* pp. 204-209; *Encyclopaedia of the Social Sciences,* Vol. XV, p. 383). Also, the municipalities recognized the fact that great care was required in keeping the sewage disposal systems from contaminating the water supply, and were willing to make the huge—and non-profitable—expenditures necessary to do this (THOMPSON, *op. cit.,* p. 209; *American Water Works Journal,* Vol. 3 [1916] p. 302). "Accordingly improved methods of * * * providing drinking water and disposing of sewage have been devised, that make the metropolis a more

healthful place than the town ever was, more healthful even than some country districts. And this influence has been radiating out to the tributary towns and to the villages and scattered homesteads." (GRAS, *An Introduction to Economic History* [1922], p. 324).

From the public health standpoint, water cannot be sold at a profit or be adequately handled by private enterprise in large cities. "Water is as essential to the health and comfort of mankind as the air we breathe; and when mankind congregate in masses * * * it is essential to the public health that it be most abundant, not doled out to yield to others 30 per cent interest, but supplied from the public rates and at the net cost" (*Royal Commission on the State of Large Towns,* 1843-1845, Vol. II, Appendix, p. 193; cf. *History of the Origin and Progress of the Water Supply of Manchester,* 1851; WEBB, *Statutory Authorities,* p. 261.)

This Court has recognized the direct relationship of the water supply to the health and safety of the community:

> "No higher police duty rests upon municipal authority than that of furnishing an ample supply of pure and wholesome water for public and domestic uses. The preservation of the health of the community is best obtained by the discharge of this duty, to say nothing of the preservation of property from fire, so constant an attendant upon crowded conditions of municipal life." *Columbus* v. *Mercantile Trust Company,* 218 U. S. 645, 658.

2. PUBLIC SAFETY.

The public safety requires governmental control of the water system. The building of an under-

ground water conduit by Hezekiah was in anticipation of an attack by the Assyrians (*supra,* p. 10). Similarly, New York City's Catskill Aqueduct, which is 120 miles long and has a daily capacity of 500,000,000 gallons, is, for purposes of safety, mainly built underground and has inverted siphons instead of exposed structures to cross rivers and valleys. HALL, *The Catskill Aqueduct* (1918). Pollution or diversion of the water supply system would obviously affect the public safety. The interruption of the flow of water into New York City for one day would cause havoc.

3. FIRE PROTECTION.

The public protection against fire, particularly in large cities, requires the municipal operation and control of the water system. Cf. *Columbus* v. *Mercantile Trust Company,* 218 U. S. 645, 658; Vol. 9, *Encyclopaedia Britannica, "Fire Protection and Extinction",* page 279. A high pressure "stand by" system with adequate hydrants is required for fire-fighting in urban centers. "The water supply is vital, not only for the health and convenience of domestic and business consumers, but also for public purposes, particularly for use in the extinguishment of fires, for the flushing of sewers and the sprinkling of streets. Without an adequate water supply, fire protection is impossible" (Vol. 19, *Encyclopaedia Americana,* p. 580). The Committee of Twenty of the National Board of Fire Underwriters has commented on the inadequacy of private ownership in this respect, and has taken the view that municipally operated water works meet the requirements of fire protection better than private systems (*National Civic Federation Report,* Part I, Vol. I, p. 130 [1907]).

4. Sewage Disposal.

The public necessity for proper and adequate sewage disposal requires governmental operation and control of the water supply system. Without water, the sewerage systems of large cities could not function. Babbitt, *Sewerage and Sewage Treatment* (4th ed., 1932) p. 1 *et seq.*; R. 33, 34. "No general sewerage system is possible until a public water supply under pressure has been developed, and so the very inability of the young communities to dispose of their sewage increases the danger of their primitive water supply and hastens the time when a public supply must be developed". Vol. 19 *Encyclopaedia Americana*, p. 579; cf. Munro, *op. cit.*, p. 720.

5. The Conservation of a Natural Vital Resource.

The public need of conserving water—one of the few natural vital resources—commands the governmental operation and control of the water supply in urban centers. New York Conservation Law, §§ 533, 540; L. 1933, ch. 563; N. Y. Const., Article VII, § 7.

> "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it." *New Jersey* v. *New York*, 283 U. S. 336, 342.

6. The Use of Water for Public Purposes.

The need of water for such public purposes as street cleaning and sprinkling, for schools, hospitals, parks, public baths and swimming pools, cemeteries and public buildings, requires a municipally operated water system (*Encyclopaedia of the Social Sciences*, tit. "Water Supply", Vol. XV, p. 374; Vol. 19, *Encyclopaedia Americana*, pp. 579, 580; Leavitt, *The*

American City [May, 1914], pp. 422-426). It is common knowledge that in urban centers, water has practically displaced the broom for street cleaning purposes.

7. The Public Need of Water for Growing Cities.

The growth of cities demands a public water supply system. "The development of satisfactory water systems for large cities has been accompanied by the supplanting of private by public enterprise" (Vol. XV, *Encyclopaedia of the Social Sciences*, tit. "Water Supply", p. 373). "As cities grow larger and the use of water required for domestic, industrial and public purposes becomes greater than any suitable supply available in the immediate vicinity, it becomes necessary to build acqueducts and pipe lines to distant water sheds, and to spend enormous sums of money to protect the purity of the supply, to bring it to the City and to distribute it to the people for its various uses" (Vol. 19, *Encyclopaedia Americana*, pp. 579, 580, cf. *People ex rel. City of Amsterdam* v. *Hess*, 157 N. Y. 42, 45).* For many reasons, large cities cannot generally get their requisite water supply within their own limits or from underground sources. In London, Paris or New York, for example, it would be impossible to obtain enough pure water by digging wells or by using the rivers located within their limits.

As the population of cities increases, tanks, reservoirs and canals are constructed as they were in Assyria, Babylonia, Egypt and China. The sources of the Tigris and Euphrates and the waters of the

* See cases cited in the Petition for Certiorari herein, pp. 12-13.

rivers themselves were conveyed through a network of canals to water the many cities of Mesopotamia. HAMMURABI's *Code of Laws* (2250 B. C.) provided for the protection of some of such canals. (*Encyclopaedia Americana*, Vol. 29, p. 40.)

As cities grow water supply problems are presented which cannot be adequately solved by private enterprise. Often to obtain an adequate supply of water it is necessary to go outside of the geographical limits of a state. The issues presented to and decided by this Court in *New Jersey* v. *New York, supra,* indicate some of the many water supply problems which only the sovereign states can adequately handle. "Different considerations come in when we are dealing with independent sovereigns having regard to the welfare of the whole population and when the alternative to settlement is war" *New Jersey* v. *New York, supra,* p. 342.

POINT V.

The history, powers and functions of the New York City Department of Water Supply demonstrate that it performs not only usual governmental functions, but functions which only the sovereign can adequately perform.

1. The History.

In 1658, a few years after the city of New Amsterdam (New York) was incorporated, public wells were sunk in the most important streets. These were used to furnish water for extinguishing fires and for domestic use (WEGMANN [1896] "*Water Supply of the City of New York, 1658-1895*" p. 3; Vol. 7, Records of New Amsterdam, p. 190). In 1676, the Burgomasters provided for more public wells. They "ordered that the severall weells bee made in

the places hereafter menconed (for the publique good of the Cytie)" Vol. I, Minutes of the Common Council of the City of New York, page 46.

Additional public wells were sunk from time to time. On September 10, 1686, the Common Council ordered nine more wells to be built. These were built of stone, "one halfe of the charge of them to be borne by the inhabitants of every Streete proportionately and the other halfe by the Citty" (HALL, *The Catskill Aqueduct and the Earlier Water Supplies of New York City,* Printed as Appendix E in the Twenty-Third Annual Report of the American Scenic and Historic Preservation Society [1918], p. 675; cf. WEGMANN, *supra,* p. 3). The supervision and charge of all the public wells of each ward was given to its Alderman and Common Councilman (WEGMANN, *op cit.,* p. 3).

Pumps came into fashion in the first half of the 18th century and rapidly displaced the old well-sweeps (HALL, *op cit.,* p. 675). After the City had bought its first fire engines, about 1740, it became even more necessary to maintain the water supply. In November, 1741, the Assembly enacted a law (ch. 719) entitled "An act for mending and keeping in repair the publick wells and pumps of the City of New York". Provision was made in this law for the appointment of Overseers of Wells and Pumps, the levying of taxes for their maintenance, and for penalties for interfering with the pumps (HALL, *op. cit.,* pp. 675, 676). The Overseers often neglected their duties and the Common Council, on September 16, 1789, "Ordered that whenever the Overseers of the Public Pumps neglect or refuse to do their duty that the Aldn & Asst of the Ward direct the necessary Repairs; lest by the want of water from the public wells and pumps the City may be endangered in case of Fire", HALL, *op. cit.,* p. 677. The expense of these pumps was borne jointly by the city and the neighborhood. HALL, *op. cit.,* p. 676.

With the growth of New York City, the well water became polluted by organic matter and insufficient in quantity. "The water from the wells in the densely populated districts became so bad that it was sickening to strangers * * *. Besides being objectionable in quality the water obtained from wells was found to be insufficient in quantity for the growing wants of the community and the citizens sought, therefore, more ample sources of supply" (WEGMANN, *op. cit.*, pp. 3 and 4).

The earliest proposal to supply New York City from a common public reservoir with water conducted underground through pipes was made to the Common Council in 1774 by Christopher Colles. At first, the novelty of the plan delayed its adoption. Finally, on July 21, 1774, a majority of the Council approved it. At the same time the Council voted to issue "New York Water Works" notes to the amount of £2,600. Subsequent issues brought the amount up to £9,100. These notes were obligations of the City (Minutes of the Common Council of the City of New York, 1675-1776, Vol. 8, pp. 26, 40, 41, 47, 49, 69; HALL, *op. cit.*, pp. 694, 695; WEGMANN, *op. cit.*, p. 4). During 1775, the City went ahead with the construction of the Colles project. The revolutionary war, however, permanently interrupted the construction (HALL, *op. cit.*, pp. 700, 701).

After the war many new proposals for the development of the water supply system were made (HALL, *op. cit.*, pp. 702-715). In 1785 and 1786, Samuel Ogden and Robert Livingston made proposals for the operation of private water supply systems. On April 19, 1786, the day before the date set for opening the proposals, a strong sentiment was shown at the Common Council meeting against letting out the water supply to private enterprise. The aldermen and assistants were requested to find out from their constituents "whether the corporation ought to grant to indi-

viduals the privilege of supplying the city with water or whether the same ought to be undertaken by the corporation and that the moneys necessary for the purpose should be raised by a tax on the citizens'' (HALL, *op. cit.*, pp. 702-704).

No action was taken on these proposals and between 1786 and 1798 many new proposals were made. The most novel at the time was Dr. Joseph Brown's project to go to the Bronx River for water. This was apparently the first suggestion for going off the Island of Manhattan for this purpose. On December 17, 1798, the Committee of the Common Council which was appointed to investigate this suggestion reported in its favor, and (according to HALL, *op. cit.*, pp. 704-706) made three specific recommendations:

> First, that William Weston * * * be requested to examine the river, the grounds for the aqueducts, etc., and report his opinion;
>
> Second, *that in view of the importance of the matter to the comfort and health of the inhabitants, and the fact that private parties would not undertake the enterprise except with the prospect of gain at the expense of the citizens, the water works should be under the control of the corporation as the immediate representative of the citizens in general;*
>
> Third, that the Legislature be requested to pass a law giving the City power to undertake the work and to raise the necessary funds by taxation.

Mr. Weston was consulted and on March 14, 1799, made his report.

Shortly thereafter, on April 2, 1799, the Manhattan Company was incorporated by Aaron Burr and several others. The charter—as is well known—also granted banking powers to the corporation. The original capital of the corporation was $2,000,000. The Manhattan Company pro-

ceeded to execute its charter powers to construct and operate a water-works system. It built reservoirs and laid the first pipe line system of water works in the then small city (HALL, *op. cit.*, p. 717).

The inefficient and unsatisfactory service rendered by the Manhattan Company caused the immediate rise of bitter discontent and agitation for the restoration of the public municipal water system. On August 27, 1804, the Common Council appointed a Committee to investigate the practicability of supplying the City with water and to confer with the Directors of the Manhattan Company as to their terms for ceding to the Corporation the works established by them for supplying the City with water (HALL, *op. cit.*, p. 720). Nothing effective appears to have been done by the Committee.

From 1804 to 1829 there was again constant agitation for an adequate water supply (HALL, *op. cit.*, pp. 720-732). In 1829 the city built a reservoir in the block between Broadway, Fourth Avenue, 13th and 14th Streets, for the distribution of water for fire extinguishing purposes (HALL, *op. cit.*, p. 731). In 1832 a 12-horse-power steam engine was installed at the well to force water through a main pipe to the reservoir (HASWELL'S *Reminiscences*, pp. 264, 285).

This water supply was inadequate and between 1829 and 1836 events moved rapidly toward the City's Croton system. In 1831, the Board of Aldermen adopted a resolution "setting forth that the Manhattan Company * * * has not, * * * complied with the conditions of their charter [and] * * * asking a repeal of said powers * * * and the vesting exclusively of such powers * * * in the corporation of the City of New York". This resolution was vigorously debated but was lost (WEGMANN, *op. cit.*, p. 19).

However, the need and agitation for an adequate water supply did not cease. The frightful ravages of the

cholera—from which the population suffered during the summer of 1832—gave new interest to the subject (WEGMANN, *op. cit.*, p. 21). In the fall of 1832, the Joint Committee of the Common Council on Fire and Water engaged Colonel DeWitt Clinton to report on the subject. In his report, Colonel Clinton condemned the quality of the water supplied by the Manhattan Company and its failure to further prosecute the work of supplying the City with water. Colonel Clinton also pointed to the municipal water works as an example of a properly operated water supply, but warned that it would soon be inadequate (Board of Aldermen, Document No. 61, November 10, 1832, pp. 194, 195).

After much effort, the Common Council had the Legislature of the State pass an act on February 26, 1833, providing for the appointment by the Governor and Senate of five persons as Water Commissioners, whose duty it was "to examine and consider all matters relative to supplying the City of New York with a sufficient supply of pure and wholesome water for the use of its inhabitants, and the amount of money necessary to effect that object" (L. 1833, ch. 36). Pursuant to this act, the Croton water shed was chosen as the source of supply. The first Croton Aqueduct was constructed under the provisions of L. 1834, ch. 256, and supplementary legislation. Its construction by the City was approved by a large majority of the electors (HALL, *op. cit.*, p. 735). The construction was financed by "water stock of the City of New York" (WEGMANN, *op. cit.*, pp. 31, 38, 43). The total cost of the old Croton aqueduct amounted to about $12,000,000 (WEGMANN, pp. 48, 311). It has a capacity of 90,000,000 gallons a day (HALL, *op. cit.*, p. 744).

In February, 1834, the Common Council adopted a resolution accepting the proposal of the Manhattan Company to enter into a negotiation for the sale of the Company's rights to supply water (HALL, *op. cit.*, p. 734). At this time the

Manhattan Company ceased to supply water. With the demise of the Manhattan Company as a water company, the City entered into an uninterrupted course of municipal operation of its water supply. Every other private company which had been chartered by the Legislature to supply New York City with water failed to do so, their charters either having been voluntarily abandoned or having expired by non-user (Board of Aldermen, Document No. 61, November 10, 1832, pp. 197, 198, 210).

Because of the phenomenal growth of New York City, the old Croton water supply of 90,000,000 gallons a day soon proved inadequate. It became necessary not only to built additional reservoirs, but also to tap other sources and to build another aqueduct from the Croton valley. In 1880 and 1885 an additional daily supply of 22,000,000 gallons was tapped from the Bronx and Byram Rivers. The new Croton aqueduct was built from 1885 to 1893. It has a capacity of 300,000,000 gallons a day (HALL, *op. cit.*, p. 744).

This new supply also soon proved inadequate. After the alarming deficiencies in rainfall in 1895 and 1896, agitation was started for an additional water supply. This agitation came to partial fruition in 1905 (cf. L. 1905, ch. 724). Under this chapter, the present Catskill water supply system was constructed. The water for this system is drawn from the Ashokan Reservoir on the Esopus watershed and from the Schoharie Reservoir on the Schoharie watershed, both being in the Catskill Mountain area. The Catskill Aqueduct is about 120 miles long. The Catskill system cost about $225,000,000 (R. 23). It has a capacity of about 600,000,000 gallons per day (General Report of the Catskill Water Supply System, Board of Water Supply of the City of New York [1936], p. 4). The New York City system now supplies about 900,000,000,000 gallons of water per day (Annual Report of Department of Water Supply for 1935,

Table 1). The total construction cost up to December 31, 1935, to the City to construct its water system was $513,278,684.55 (Annual Report, *supra,* Table 15).

The continuing and compelling need for an additional water supply is presently engaging the attention of New York City officials (R. 23-25). The proposed plan encompasses an additional supply of water from the drainage areas tributary to the Rondout Creek and the Delaware River at an estimated cost of more than $225,000,000 (R. 23-25; cf. *New Jersey* v. *New York,* 283 U. S. 336). The Governor of the State of New York in his special message to the Legislature of February 20, 1936, urged that immediate action must be taken to avert the dangers of a water shortage to the City of New York (Vol. 55, N. Y. State Department Reports, p.).

2. The Powers and Functions of the New York City Department of Water Supply, Gas & Electricity.

The Department of Water Supply, Gas and Electricity, like the Police, Fire and Law Departments, is one of the constituent divisions of the government of the City of New York (Greater New York Charter §§ 450-453, 468-532). It sues and is sued in the name of the City of New York. In such litigation, it is represented by the Corporation Counsel, the law officer of the City (Greater New York Charter § 255). The head of the Department of Water Supply, Gas and Electricity is a Commissioner (Charter § 468). He has the power to appoint a chief engineer of the department (Charter § 453). After many years in the Civil Service, the petitioner was appointed as Chief Engineer of Water Supply (R. 20).

The following were some of the petitioner's duties as Chief Engineer: To protect the water supply from pollution; to supervise and direct the purification of the water in order to free it from or to destroy polluting matter that may have entered the water supply; to direct the proper maintenance of the high pressure fire systems and the hydrants for fire extinguishment and other public uses; to determine the amount of water to be drawn from the various sources of supply; to determine how the various parts of the water system should be operated with relationship to the retention of water for future use, the transportation of the water, the amount of water to be delivered through the various conduits, the treatment of the water in transit and within the City limits, the delivery of the water to the various parts of Greater New York, the pumping of the water to the extent required to furnish adequate pressure, and the use of the water, both inside and outside of buildings; to prevent waste of the water supply; to prepare plans for the improvement and extension of the sources of the water supply and its distribution system; and to supervise generally the supplying of water in Greater New York City (R. 21, 22, 26; Greater New York Charter §§ 469, 479).

The Commissioner of Water Supply, Gas and Electricity, with the approval of the Board of Estimate and Apportionment has the power, within and throughout the State of New York, to select and to determine all sources of water supply for the supply of the public water works of the City (Charter § 472). "Any sources of water so selected * * * shall be deemed necessary for the public use of the City of New York and thereupon, with the approval of the board of estimate and apportionment, together with the authority of the board of aldermen expressed by its resolution or ordinance, it shall be lawful

for the City of New York to acquire by condemnation any real estate * * * that may be necessary * * *. It shall be the duty of the corporation counsel to take the necessary legal proceedings, as provided in this act * * *. The City of New York is authorized to acquire by purchase, lease, or otherwise, lands or water in any other state * * * for the purpose of supplying water to the City of New York. Nothing in this section contained shall be deemed in any manner to limit the rights, property rights, power or jurisdiction now possessed by the City of New York in relation to the possession, maintenance, operation or completion of its present water system" (Charter, *supra*, § 472; and see *id.* § 46; *New York City* v. *Pine*, 185 U. S. 93; *McGovern* v. *City of New York*, 229 U. S. 363; *New Jersey* v. *New York*, 283 U. S. 336; N. Y. Const., Art. I, § 6).

The Commissioner of Water Supply is given broad powers to keep the New York City water supply system free from contamination and pollution (Charter § 479; L. 1893, ch. 189 and ch. 670).

The Department of Water Supply does not supply all of the water in the City of New York. There are still a few small private companies supplying water in the Boroughs of Richmond, Queens and Kings. Most of their water is supplied from wells which are fast being exhausted (L. 1933, ch. 563; 55 N. Y. State Dept. Reports, p. , Feb. 20, 1936). In respect of these petitioner exercises regulatory powers (Charter § 472). It should be briefly noted here that the fact that some few private companies supply water in New York City does not make the supplying of water by the City itself any the less governmental. At one time the collection of taxes was handled by private individuals, but the collection of taxes is today an admittedly governmental function (*Encyclopaedia Britannica* [14th ed., 1929] Vol. 19 [Rome] p. 491, Vol. 9 [French Law and

Institutions] p. 771). Fire protection which is today a clearly governmental function is still handled in part by private companies (N. Y. Transportation Corporation Law, Art. 8, § 81; N. Y. Tax Law, § 6-[8]). In fact, it was not until 1865 that the regular fire department of the City of New York was established (L. 1865, ch. 249). Prior to that time volunteer firemen and private companies were the sole agencies for fire protection (Lossing, *History of the City of New York*, vol. 2, pp. 227-229; New York Tax Law § 6, subd. 8). The regular police force of New York City was not established until 1844 and there are still private police in the City (L. 1844, ch. 315; *Encyclopaedia Britannica* [14th ed.], Vol. 18, p. 159; *Leonard's History of the City of New York*, p. 349). The City's free public school system was established in 1842 and there are still many private schools in the City (L. 1842, ch. 150; *Encyclopaedia of Education*, Vol. [illegible], pp. 452, 453). Similarly, the Sewerage Department was not created until 1849 and many sewers built by private owners are still in existence (L. 1849, ch. 187). The collection of taxes, education, fire and police protection and sewage disposal when handled by a municipality, even though also afforded by private enterprise, are clearly governmental functions exempt from taxation by the federal government. By the same token, the supplying of water by a municipality should be held by this Court to be a governmental function immune from federal taxation.

Conclusion.

The order of the Circuit Court of Appeals should be reversed, and the cause remanded to the Board of Tax Appeals for a redetermination of the petitioner's income tax for the year 1931.

Dated, New York, N. Y., January 11, 1937.

Respectfully submitted,

PAUL WINDELS,
Corporation Counsel of the City of New York, Amicus Curiae,
Municipal Building,
New York, N. Y.

OSCAR S. COX,
PAXTON BLAIR,
of Counsel.

FILED
FEB 2 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No. 451

William Whitlock Brush,

Petitioner,

vs.

Guy T. Helvering, Commissioner of Internal Revenue,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, NOTICE OF MOTION AND BRIEF.

JAMES H. HOWARD,
306 West Third St., Los Angeles, Cal.,
Counsel for Frank E. Weymouth, General Manager and Chief Engineer of The Metropolitan Water District of Southern California,

Amicus Curiae.

CHARLES C. COOPER, JR.,
Of Counsel.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

SUBJECT INDEX.

PAGE

Motion for Leave to File Brief as Amicus Curiae 3

Letters Consenting to Filing of Brief 5

Notice of Motion 7

Brief of Amicus Curiae 9

Preliminary Statement 9

The Case at Bar 11

Outline of Argument 12

Argument 13

I.

The public ownership and operation of waterworks for supplying the needs of the municipalities and political subdivisions of the various states, and of their inhabitants, constitute the performance of usual governmental functions 13

II.

The activities of The Metropolitan Water District of Southern California are governmental in character within the exemption from federal taxation laid down by the adjudicated cases 21

III.

Unless the court be prepared to rule that the United States may tax the obligations, property and income of publicly-owned waterworks of the various states, and that the states may tax the obligations, property and income of publicly-owned waterworks of the United States, the salaries paid by such publicly-owned waterworks to their officers and employees must be held to be exempt from taxation by the Federal Government and by the various states, respectively .. 35

Conclusion 37

TABLE OF AUTHORITIES CITED.

CASES. PAGE

American-La France Fire Eng. Co. v. Riordan, 6 Fed. (2d) 964 28
Arizona v. California, 283 U. S. 423 ..... 23, 33
Arizona v. California, 292 U. S. 341 33
Arizona v. California, 298 U. S. 558 33
Ashton v. Cameron County Water Improvement District No. One, 298 U. S. 513 ..... 20, 29, 32
Ashwander v. Tennessee Valley Authority, 297 U. S. 288 ..... 32, 33

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U. S. 142 29
City of Pasadena v. Chamberlain, 204 Cal. 653 ..... 30, 31
Collector v. Day, 11 Wall. 113 36
Columbus v. Mercantile Trust & D. Co., 218 U. S. 645 ..... 27, 28
Commissioner of Internal Revenue v. Harlan, 80 Fed. (2d) 660 30
Commissioner of Internal Revenue v. Lamb, 82 Fed. (2d) 733 .. 28
Commissioner of Internal Revenue v. Sherman, 69 Fed. (2d) 755 28

Dobbins v. Erie County, 16 Pet. 435 36

Farmers & M. Savings Bank v. Minnesota, 232 U. S. 516 35

German Alliance Insurance Co. v. Home Water Supply Co., 226 U. S. 220 28
Gillespie v. Oklahoma, 257 U. S. 501 35
Golden Gate Bridge & Highway District v. Felt, 214 Cal. 308 30

Harris v. District of Columbia, 256 U. S. 650 28
Helvering v. Powers, 293 U. S. 214 ..... 13, 32
Home Building & Loan Association v. Blaisdell, 290 U. S. 398 ..... 18, 19

PAGE

Hoskins v. Commissioner of Internal Revenue, 84 Fed. (2d) 627 20

Indian Motorcycle Co. v. United States, 283 U. S. 570 35

Lochner v. New York, 198 U. S. 45 18

Mallory v. White, 8 Fed. Supp. 989 29

Metcalf v. Mitchell, 269 U. S. 514 ..... 13, 14

Metropolitan Water District, In re, 215 Cal. 582 30

Metropolitan Water District v. Superior Court, 2 Cal. (2d) 4 30

Metropolitan Water District v. Whitsett, 215 Cal. 400 30

Morrison v. Smith Bros., Inc., 211 Cal. 36 30

Nebbia v. New York, 291 U. S. 502 ..... 19, 20

New Jersey v. New York, 283 U. S. 336 33

New Orleans Gaslight Co. v. Drainage Commission of New Orleans, 197 U. S. 453 28

New York ex rel. Rogers v. Graves, 81 L. Ed. Adv. Ops. 202, 206—decided Jan. 4, 1937 ..... 32, 33, 36

Ohio v. Helvering, 292 U. S. 360 31

Pollock v. Farmers Loan & T. Co., 157 U. S. 429 35

South Carolina v. United States, 199 U. S. 437 18

Tillman v. District of Columbia, 29 Fed. (2d) 442 ..... 27, 28

Trenton v. New Jersey, 262 U. S. 182 31

United States v. Arizona, 295 U. S. 174 33

Weston v. Charleston, 2 Pet. 449 35

Wheatley v. Superior Court, 207 Cal. 722 30

STATUTES.

PAGE

Judicial Code, Sec. 240(a) (U. S. C., Title 28, Sec. 347) 11

Metropolitan Water District Act of the State of California, Statutes of 1927, p. 694, Deering's General Laws, Act 9129 21

Sec. 3 23
Sec. 5, Subds. 1 to 5 24
Sec. 5, Subds. 7 to 9 24
Sec. 5, Subd. 8 25
Sec. 5, Subd. 10 26
Sec. 5, Subd. 12 24
Sec. 5½ 26, 27
Sec. 6 25
Sec. 6, Subd. 1 25
Sec. 6, Subd. 2 25
Sec. 6, Subd. 4 25
Sec. 6, Subd. 5 25
Sec. 7 24
Sec. 7, Subd. j 25
Sec. 8 25
Sec. 12 25
Sec. 13 25

Revenue Act of 1936—

Sec. 22, Subd. (b) (4) 36
Sec. 22, Subd. (b) (8) 36
Sec. 116, Subd. (d) 36

Rivers and Harbors Act of August 30, 1935, 74th Congress, 1st Session, Chap. 831, Sec. 2 33

Statutes of 1901, p. 27, Deering's General Laws, Act 5178, as amended 24

Statutes of 1929, p. 1613 21

Statutes of 1931, p. 814 21

Statutes of 1933, p. 1289 21

INDEX TO EXHIBITS.

PAGE

Table I—Summary Tabulation Showing Waterworks Ownership in Places of 2,500 Population and Over, by Regional State Divisions (U. S. 1930 Census).....bet. pages 16 and 17

Table I (A)—Tabulation Showing Waterworks Ownership by Places of 2,500 Population and Over, Arranged by States in Regional Divisions (U. S. 1930 Census).....bet. pages 16 and 17

Table I (B)—Tabulation Showing Waterworks Ownership by Population of Places of 2,500 and Over Arranged by States in Regional Divisions (U. S. 1930 Census)....bet. pages 16 and 17

I-C—Method of Procedure and Source-Materials Consulted in Compiling Data as to Status of Ownership of Waterworks in the United States (Tables I, I-A, and I-B)....bet. pages 16 and 17

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No. 451

William Whitlock Brush,

Petitioner,

vs.

Guy T. Helvering, Commissioner of Internal Revenue,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for Frank E. Weymouth, General Manager and Chief Engineer of The Metropolitan Water District of Southern California, moves this Honorable Court for leave to file the accompanying brief in the above captioned cause as *amicus curiae*. The con-

sent of counsel for petitioner and for respondent has been obtained, as indicated by the letters presented with this motion, printed copies thereof being annexed to this printed motion.

Respectfully submitted,

JAMES H. HOWARD,

Counsel for Frank E. Weymouth, General Manager and Chief Engineer of The Metropolitan Water District of Southern California,

Amicus Curiae.

CHARLES C. COOPER, JR.,

Of Counsel.

(Letterhead of)

WRIGHT, GORDON, ZACHRY & PARLIN
(Cotton, Franklin, Wright & Gordon)
Sixty-three Wall Street
New York

December 9, 1936.

Re: *Brush vs. Commissioner*

Dear Sir:

We have your letter of November 23, 1936 and note that you desire to file a brief as amicus curiae in the United States Supreme Court in the above case. We will be glad to consent to the filing of such brief.

If you do decide to file a brief we would appreciate it if you would afford us an opportunity of seeing the draft prior to filing and allow us to make any suggestions which may occur to us.

We find that we do not have available an extra copy of the record but do enclose herewith for your information a copy of our Petition for certiorari and a copy of our brief before the Circuit Court of Appeals.

Very truly yours,
Charles C. Parlin

Mr. James H. Howard,
General Counsel,
Metropolitan Water District,
306 West Third Street,
Los Angeles, California.
(Encs.)

(Letterhead of)

OFFICE OF THE SOLICITOR GENERAL
Washington, D. C.

November 27, 1936

James H. Howard, Esq.,
306 West Third Street,
Los Angeles, Calif.

Dear Mr. Howard:

Re: *No. 451. William Whitlock Brush v. Commissioner of Internal Revenue.*

In reply to your letter of November 23, you have my consent to the filing of an *amicus curiae* brief on behalf of Mr. F. E. Weymouth. I shall be glad to send you copies of the Government's brief in the *Brush* case when it is printed.

Very truly yours,

STANLEY REED
Solicitor General

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No. 451

William Whitlock Brush,

Petitioner,

vs.

Guy T. Helvering, Commissioner of Internal Revenue,

Respondent.

Sirs:

You will please take notice that the foregoing motion will be presented to the Supreme Court of the United States at a session thereof appointed to be held at the Court House of the Supreme Court of the United States in the City of Washington, D. C., on Monday, the 1st day

of February, 1937, at the opening of Court on that day, or as soon thereafter as counsel can be heard.

Dated: Los Angeles, California, January 29, 1937.

Yours respectfully,

JAMES H. HOWARD,

Counsel for Frank E. Weymouth, General Manager and Chief Engineer of The Metropolitan Water District of Southern California,

Amicus Curiae.

Office and P. O. Address:
306 West Third Street,
Los Angeles, California.

CHARLES C. COOPER, JR.,
Of Counsel.

To:

Boykin C. Wright and Charles C. Parlin, Esquires,
Counsel for Petitioner,
63 Wall Street, New York, N. Y.

The Solicitor General,
Counsel for Respondent,
Department of Justice,
Washington, D. C.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No. 451

William Whitlock Brush,

Petitioner,

vs.

Guy T. Helvering, Commissioner of Internal Revenue,

Respondent.

BRIEF OF AMICUS CURIAE.

PRELIMINARY STATEMENT.

This brief is submitted because the undersigned is counsel for the General Manager and Chief Engineer of The Metropolitan Water District of Southern California in the suit now pending in the District Court of the United States in and for the Southern District of California, Central Division, to recover taxes paid on salary

received as such officer during the calendar year 1932. (*Frank E. Weymouth v. United States of America,* No. 7463-J.)

The outcome of that case will be affected, and may be controlled, by the decision of the case now before this Court. The principles applied by Your Honors herein may be of sufficient scope to fully dispose of the matter now pending in the District Court. It happens, however, that there are certain distinctions in the matter of organization, operation and underlying purpose that, if brought to the attention of the Court, may permit of the exemption from taxation of the salaries of officers of The Metropolitan Water District of Southern California even though the Court should hold the salary of the petitioner herein to be taxable.

In the following brief, emphasis will be placed upon the factual situation respecting the ownership of public water supplies throughout the United States. Effort will be made to point out the fundamental, governmental aspect of the furnishing of such water supplies by publicly-owned systems with especial reference to the precise function performed by The Metropolitan Water District of Southern California. Some mention will be made of the judicial precedents, but the other briefs filed in this case have discussed the pertinent authorities so ably and fully that very little, if anything, can be added on that score.

The writer respectfully submits that the functions performed by the City of New York and its Board of Water Supply are of such an usual governmental nature as to render those functions and the salary paid to petitioner at bar exempt from Federal Income Tax. The reasons for this opinion will appear in the following pages.

Further, it is our view that even if the salary of the petitioner at bar be held to be taxable by the United States, the salaries paid by The Metropolitan Water District of Southern California to its officers and employees, and notably to the writer's client, would be exempt. It is in part for the purpose of indicating the distinctions and enabling this Honorable Court to bear in mind the effect of the decision upon other cases which are now pending in the lower courts and which may reach this Court in due course that the writer submits the following argument:

THE CASE AT BAR.

On July 13, 1936, the Circuit Court of Appeals for the Second Circuit affirmed the order of the United States Board of Tax Appeals assessing a deficiency tax on the salary received by petitioner for the year 1931 as Chief Engineer of Water Supply in the Department of Water Supply, Gas, and Electricity of the City of New York. The case is here on writ of *certiorari* pursuant to Judicial Code, Sec. 240(a) (U.S.C., Title 28, Sec. 347).

OUTLINE OF ARGUMENT.

I.

The public ownership and operation of waterworks for supplying the needs of the municipalities and political subdivisions of the various states, and of their inhabitants, constitute the performance of usual governmental functions.

II.

The activities of The Metropolitan Water District of Southern California are governmental in character within the exemption from Federal taxation laid down by the adjudicated cases.

III.

Unless the Court be prepared to rule that the United States may tax the obligations, property, and income of publicly-owned waterworks of the various states, and that the states may tax the obligations, property, and income of publicly-owned waterworks of the United States, the salaries paid by such publicly-owned waterworks to their officers and employees must be held to be exempt from taxation by the Federal Government and by the various states, respectively.

ARGUMENT.

I.

The Public Ownership and Operation of Waterworks for Supplying the Needs of the Municipalities and Political Subdivisions of the Various States, and of Their Inhabitants, Constitute the Performance of Usual Governmental Functions.

Since the decision of this Court in *Helvering v. Powers*, 293 U. S. 214 (1934), the test of exemption depends upon whether the activity constitutes an "usual governmental function." The Constitution prohibits the Federal Government from taxing the state or any municipality, public corporation or agency of the state, either directly, by taxing its obligations, or its property or income, or indirectly, by taxing the salaries paid to the officers and employees thereof, if the state activity involved be an usual governmental function. Similarly, the states cannot tax the United States or any of its public corporations or agencies if thereby an usual governmental function be affected. (*Helvering v. Powers, supra*, at p. 225 and cases cited.)

This Court has declined to define the term "governmental function" or to lay down any precise limits respecting the exemption of state instrumentalities from Federal taxation and of Federal instrumentalities from state taxation. (*Metcalf v. Mitchell*, 269 U. S. 514, 521-522—1925.) However, in the cited case, government counsel conceded that the salary paid to the Chief Engineer of the Kennebec Water District was exempt and the Court so held (p. 519).

Certainly, if the experience of society down the years and the resulting trend toward almost universal public ownership of waterworks have any validity in determining

constitutional questions, the counsel who represented the United States in the *Metcalf* case, more than a decade ago, possessed a greater perception of social institutions than do counsel for the respondent at bar.

An interesting discussion of the historical development of the public ownership of waterworks in the United States and Canada may be found at pages six to eleven, in chapter one of Water Works Practice, being a manual issued by the American Water Works Association (Baltimore, The Williams & Wilkins Company, 1926). The author gives the following table:

"Growth in Number and Changes in Ownership of United States Water-works Since 1800

					Per Cent Total		
	Total	Public	Private	Unknown	Public	Private	Unknown
1800	16*	1	15*		6.3*	93.7*	
1810	26	5	21		19.2	80.8	
1820	30	5	25		16.6	83.4	
1830	44	9	35		20.5	79.5	
1840	64	23	41		35.9	64.1	
1850	83	33	50		39.7	60.3	
1860	136	57	79		41.9	58.1	
1870	243	116	127		47.7	52.3	
1880	598	293	305		49.0	51.0	
1890	1,878	806	1,702		42.9	57.1	
1896	3,196	1,690	1,489	17	52.9	46.6	0.5
1924**	9,850	6,900	2,950		70.0	30.0	

*Since this table was originally compiled one additional works, privately owned, in existence before 1800, has come to light, but as the figures up to 1896 have been before the public for many years and the change is so slight, with percentages not affected after the first few lines, it has not seemed worth while to remake the table.

**Estimated."

In order to indicate as accurately as possible the present status of the ownership of public water supplies in the United States, there are inserted between pages 16 and 17 three tables which have been prepared under the writer's supervision and are believed to be substantially accurate. Immediately following Table I-B is an insert explaining the procedure followed and the sources of information consulted.

All incorporated cities of twenty-five hundred or more inhabitants, as listed in the 1930 Census of the United States, with their respective populations, have been covered. The cities have been grouped into states and geographical regions according to the practice of the Census Bureau, and the information respecting the ownership of their water supplies has been classified accordingly. This information has been checked as nearly as possible to June 30, 1936.

Table 1 is a summary of the ownership of public water supplies throughout the United States, segregated by geographical regions, and further classified into the various population groups listed in the 1930 Census. This table shows for each region and population group the total number of cities and their population; the number of cities and their population for which information was lacking with regard to the ownership of their water supplies and the percentage thereof to the total number of cities; the number of cities and their population for which information was obtained respecting the ownership of their water supplies and the percentage thereof to the total number of cities; the number of cities and their population served by municipally-owned waterworks and the percentage thereof to the total number of cities for

which ownership information was obtained; the number of cities and their population served by privately-owned waterworks and the percentage thereof to the total number of cities for which ownership information was obtained. A grand summary for the entire United States and for all population groups covered, also appears in this table.

Table I is supported in detail by Tables I-A and I-B. Table I-A gives the detail by states and regional divisions and for the various population groups with respect to the number of cities. Table I-B gives the corresponding detail with respect to the population.

The 1930 Census lists 16,598 incorporated places in the United States, of which 3,169 contain 2,500 or more inhabitants, aggregating a total population of 68,954,277. These are the cities which are covered in the foregoing tables. The remaining cities, containing less than 2,500 inhabitants, although numbering 13,429 places, contain only 9,183,999 persons. Thus, the survey recorded in Tables I, I-A, and I-B covers approximately 19 per cent. in number of the 16,598 incorporated places in the United States and 88 per cent. of the total population of 78,138,276 of all such incorporated places.

This study shows that the status of ownership of waterworks was ascertained for 87.3 per cent. of the 3,169 cities of 2,500 or more population, embracing 97.2 per cent. of the aggregate population of such incorporated places. Of these cities for which information was obtained concerning their waterworks, 76.4 per cent. were served by publicly-owned systems, embracing 86.4 per cent. of the total population of all such cities for which data concerning ownership was available.

SUMMARY TABULATION SHOWING WATERWORKS OWNERSHIP
in Places of 2,500 Population and Over, by Regional
State Divisions. (U.S. 1930 Census)

For explanation of Method of Compilation and References as to Source Material, see notations following Table I-(B)

Population Groups \ Geographical Regions	New England		Middle Atlantic		East North Central		West North Central		South Atlantic		East South Central		West South Central		Mountain		Pacific		Plac
	Places	Population	Places	Population	Places	Population	Places	Population	Places	Population	Places	Population	Places	Population	Places	Population	Places	Population	
2,500 and Over																			
Total	232	6,311,976	719	20,394,707	658	16,794,908	351	5,556,181	341	5,698,122	193	2,778,687	324	4,427,439	130	1,457,922	221	5,534,335	3169
Less Undetermined	29	190,218	133	748,789	87	380,496	36	130,838	34	130,228	23	90,807	50	190,115	8	32,676	2	5,873	402
% "	12.5	3.0	18.5	3.7	13.2	2.3	10.3	2.4	10.0	2.0	11.9	3.3	15.4	4.3	6.2	2.2	0.9	0.1	12
Total Determined	203	6,121,758	586	19,645,918	571	16,414,412	315	5,425,343	307	5,567,894	170	2,687,880	274	4,237,324	122	1,425,246	219	5,528,462	2767
% "	87.5	97.0	81.5	96.3	86.8	97.7	89.7	97.6	90.0	98.0	88.1	96.7	84.6	95.7	93.8	97.8	99.1	99.9	87
Privately Owned	33	784,495	283½	3,571,655	89	1,705,411	38	670,074	41½	516,096	52½	754,143	45½	478,718	20	185,593	50½	445,116	653
% " "	16.3	12.8	48.3	18.2	15.6	10.4	12.1	12.4	13.5	9.3	30.9	28.1	16.6	11.3	16.4	13.1	23.1	8.1	23
Municipally Owned	170	5,337,263	302½	16,074,263	482	14,709,001	277	4,755,269	265½	5,051,798	117½	1,933,737	228½	3,758,606	102	1,239,653	168½	5,083,346	2113
% " "	83.7	87.2	51.7	81.8	84.4	89.6	87.9	87.6	86.5	90.7	69.1	71.9	83.4	88.7	83.6	86.9	76.9	91.9	76
25,000 and Over																			
Total	55	4,457,465	76	15,499,658	97	12,810,858	27	3,482,012	41	3,826,115	16	1,642,976	27	2,607,986	10	727,281	28	4,187,986	377
Less Undetermined	-	-	2	81,792	-	-	-	-	-	-	-	-	-	-	-	-	-	-	2
% "	-	-	2.6	0.5	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
Total Determined	55	4,457,465	74	15,417,866	97	12,810,858	27	3,482,012	41	3,826,115	16	1,642,976	27	2,607,986	10	727,281	28	4,187,986	375
% "	100	100	97.4	99.5	100	100	100	100	100	100	100	100	100	100	100	100	100	100	99
Privately Owned	8	509,551	24	1,389,943	16	1,058,484	8	423,343	3½	260,505	4	458,753	5	186,936	1	39,532	4	157,895	73
% " "	14.4	11.4	32.4	9.0	16.5	8.3	29.6	12.2	8.5	6.8	25.0	27.9	18.5	7.0	10	5.4	14.3	3.8	19
Municipally Owned	47	3,947,914	50	14,027,923	81	11,752,374	19	3,058,669	37½	3,565,610	12	1,184,223	22	2,421,050	9	687,749	24	4,030,091	301
% " "	85.6	88.6	67.6	91.0	83.5	91.7	70.4	87.8	91.5	93.2	75.0	72.1	81.5	93.0	90	94.6	85.7	96.2	80
10,000 to 25,000																			
Total	78	1,242,450	162	2,497,660	121	1,788,908	62	890,322	52	725,071	32	478,377	42	626,033	17	239,867	42	608,506	608
Less Undetermined	2	24,261	8	121,312	1	13,899	-	-	-	-	-	-	-	-	-	-	-	-	11
% "	2.6	2.0	4.9	4.9	0.8	0.8	-	-	-	-	-	-	-	-	-	-	-	-	1
Total Determined	76	1,218,189	154	2,376,348	120	1,775,009	62	890,322	52	725,071	32	478,377	42	626,033	17	239,867	42	608,506	597
% "	97.4	98.0	95.1	95.1	99.2	99.2	100	100	100	100	100	100	100	100	100	100	100	100	98
Privately Owned	13	213,035	76	1,187,468	25½	379,394	8	131,174	7	113,817	6	91,694	8	128,242	5	78,400	6	82,187	154
% " "	17.1	17.5	49.3	49.9	21.3	21.4	12.9	14.7	13.5	15.7	18.8	19.2	19.1	20.5	29.4	32.7	14.3	13.5	25
Municipally Owned	63	1,005,154	78	1,188,880	94½	1,395,615	54	759,148	45	611,254	26	386,683	34	497,791	12	161,467	36	526,319	442
% " "	82.9	82.5	50.7	50.1	78.7	78.6	87.1	85.3	86.5	84.3	81.2	80.8	80.9	79.5	70.6	67.3	85.7	86.5	74
5,000 to 10,000																			
Total	68	491,561	194	1,363,751	186	1,282,329	82	558,719	87	589,342	45	304,737	89	605,546	39	269,556	61	431,615	851
Less Undetermined	15	119,733	32	229,005	23	143,857	6	36,685	5	33,891	4	26,634	6	39,638	1	7,695	-	-	92
% "	22	24.4	16.5	16.8	12.3	11.2	7.3	6.6	5.7	5.8	8.9	8.7	6.7	6.5	2.6	2.9	-	-	10
Total Determined	53	371,828	162	1,134,746	163	1,138,472	76	522,034	82	555,451	41	278,103	83	565,908	38	261,863	61	431,615	759
% "	78	75.6	83.5	83.2	87.7	88.8	92.7	93.4	94.3	94.2	91.1	91.3	93.3	93.5	97.4	97.1	100	100	89
Privately Owned	7	43,079	93½	674,429	27	188,627	11	71,754	9	63,938	18½	119,849	13	85,881	5	32,787	19	131,660	203
% " "	13.2	11.6	57.6	59.4	16.6	11.6	14.5	13.7	11.0	11.5	45.1	43.1	15.7	15.2	13.2	12.5	31.2	30.5	26
Municipally Owned	46	328,749	68½	460,317	136	949,845	65	450,280	73	491,513	22½	158,254	70	430,027	33	229,076	42	299,955	556
% " "	86.8	88.4	42.4	40.6	83.4	83.4	85.5	86.3	89.0	88.5	54.9	56.9	84.3	84.8	86.8	87.5	68.8	69.5	73
2,500 to 5,000																			
Total	31	120,500	287	1,033,638	254	912,813	180	625,128	161	557,594	100	352,597	166	587,874	64	221,218	90	306,228	1333
Less Undetermined	12	46,224	91	316,680	63	222,740	30	94,153	29	96,337	19	64,173	44	150,477	7	24,983	2	5,873	297
% "	38.7	38.4	31.7	30.6	24.8	24.4	16.7	15.1	18.0	17.3	19.0	18.2	26.5	25.6	10.9	11.3	2.2	1.9	22
Total Determined	19	74,276	196	716,958	191	690,073	150	530,975	132	461,257	81	288,424	122	437,397	57	196,235	88	300,355	1036
% "	61.3	61.6	68.3	69.4	75.2	75.6	83.3	84.9	82.0	82.7	81.0	81.8	73.5	74.4	89.1	88.7	97.8	98.1	77
Privately Owned	5	18,830	90	319,815	20½	78,906	11	43,803	22	77,836	24	83,847	19½	77,669	9	34,874	21½	73,374	222
% " "	26.3	25.4	45.9	44.6	10.7	11.4	7.3	8.3	16.6	16.9	29.6	29.1	16.0	17.8	15.8	17.8	24.5	24.4	21
Municipally Owned	14	55,446	106	397,143	170½	611,167	139	487,172	110	383,421	57	204,577	102½	359,738	48	161,361	66½	226,981	813
% " "	73.7	74.6	54.1	55.4	89.3	88.6	92.7	91.7	83.4	83.1	70.4	70.9	84.0	82.2	84.2	82.2	75.5	75.6	78

SUMMARY TABULATION SHOWING WATERWORKS OWNERSHIP
in Places of 2,500 Population and Over, by Regional
State Divisions. (U.S. 1930 Census)

For explanation of Method of Compilation and References as to Source Material, see notations following Table I-(B)

TABLE I

ical ions	New England		Middle Atlantic		East North Central		West North Central		South Atlantic		East South Central		West South Central		Mountain		Pacific		Total	
	Places	Population	Places	Population	Places	Population	Places	Population	Places	Population	Places	Population	Places	Population	Places	Population	Places	Population	Places	Population
	232	6,311,976	719	20,394,707	658	16,794,908	351	5,556,181	341	5,698,122	193	2,778,687	324	4,427,439	130	1,457,922	221	5,534,335	3169	68,954,277
ned	29	190,218	133	748,789	87	380,496	36	130,838	34	130,228	23	90,807	50	190,115	8	32,676	2	5,873	402	1,900,040
"	12.5	3.0	18.5	3.7	13.2	2.3	10.3	2.4	10.0	2.0	11.9	3.3	15.4	4.3	6.2	2.2	0.9	0.1	12.7	2.8
ed	203	6,121,758	586	19,645,918	571	16,414,412	315	5,425,343	307	5,567,894	170	2,687,880	274	4,237,324	122	1,425,246	219	5,528,462	2767	67,054,237
"	87.5	97.0	81.5	96.3	86.8	97.7	89.7	97.6	90.0	98.0	88.1	96.7	84.6	95.7	93.8	97.8	99.1	99.9	87.3	97.2
d	33	784,495	283½	3,571,655	89	1,705,411	38	670,074	41½	516,096	52½	754,143	45½	478,718	20	185,593	50½	446,116	655½	9,111,301
"	16.3	12.8	48.3	18.2	15.6	10.4	12.1	12.4	13.5	9.3	30.9	28.1	16.6	11.3	16.4	13.1	23.1	8.1	23.6	13.6
ned	170	5,337,263	302½	16,074,263	482	14,709,001	277	4,756,269	265½	5,051,798	117½	1,933,737	228½	3,758,606	102	1,239,653	168½	5,083,346	2113½	57,942,936
"	83.7	87.2	51.7	81.8	84.4	89.6	87.9	87.6	86.5	90.7	69.1	71.9	83.4	88.7	83.6	86.9	76.9	91.9	76.4	86.4
	55	4,457,465	76	15,499,658	97	12,810,858	27	3,482,012	41	3,826,115	16	1,642,976	27	2,607,986	10	727,281	28	4,187,986	377	49,242,337
ned	-	-	2	81,792	-	-	-	-	-	-	-	-	-	-	-	-	-	-	2	81,792
"	-	-	2.6	0.5	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0.5	0.2
ed	55	4,457,465	74	15,417,866	97	12,810,858	27	3,482,012	41	3,826,115	16	1,642,976	27	2,607,986	10	727,281	28	4,187,986	375	49,160,545
"	100	100	97.4	99.5	100	100	100	100	100	100	100	100	100	100	100	100	100	100	99.5	99.8
d	8	509,551	24	1,389,943	16	1,058,484	8	423,343	3½	260,505	4	458,753	5	186,936	1	39,532	4	157,895	73½	4,484,942
"	14.4	11.4	32.4	9.0	16.5	8.3	29.6	12.2	8.5	6.8	25.0	27.9	18.5	7.0	10	5.4	14.3	3.8	19.6	9.1
ned	47	3,947,914	50	14,027,923	81	11,752,374	19	3,058,669	37½	3,565,610	12	1,184,223	22	2,421,050	9	687,749	24	4,030,091	301½	44,675,603
"	85.6	88.6	67.6	91.0	83.5	91.7	70.4	87.8	91.5	93.2	75.0	72.1	81.5	93.0	90	94.6	85.7	96.2	80.4	90.9
	78	1,242,450	162	2,497,660	121	1,788,908	62	890,322	52	725,071	32	478,377	42	626,033	17	239,867	42	608,506	608	9,097,194
ned	2	24,261	8	121,312	1	13,899	-	-	-	-	-	-	-	-	-	-	-	-	11	159,472
"	2.6	2.0	4.9	4.9	0.8	0.8	-	-	-	-	-	-	-	-	-	-	-	-	1.8	1.8
ed	76	1,218,189	154	2,376,348	120	1,775,009	62	890,322	52	725,071	32	478,377	42	626,033	17	239,867	42	608,506	597	8,937,722
"	97.4	98.0	95.1	95.1	99.2	99.2	100	100	100	100	100	100	100	100	100	100	100	100	98.2	98.2
d	13	213,035	76	1,187,468	25½	379,394	8	131,174	7	113,817	6	91,694	8	128,242	5	78,400	6	82,187	154½	2,405,411
"	17.1	17.5	49.3	49.9	21.3	21.4	12.9	14.7	13.5	15.7	18.8	19.2	19.1	20.5	29.4	32.7	14.3	13.5	25.9	26.9
ned	63	1,005,154	78	1,188,880	94½	1,395,615	54	759,148	45	611,254	26	386,683	34	497,791	12	161,467	36	526,319	442½	6,532,311
"	82.9	82.5	50.7	50.1	78.7	78.6	87.1	85.3	86.5	84.3	81.2	80.8	80.9	79.5	70.6	67.3	85.7	86.5	74.1	73.1
	68	491,561	194	1,363,751	186	1,282,329	82	558,719	87	589,342	45	304,737	89	605,546	39	269,556	61	431,615	851	5,897,156
ned	15	119,733	32	229,005	23	143,857	6	36,685	5	33,891	4	26,634	6	39,638	1	7,695	-	-	92	637,136
"	22	24.4	16.5	16.8	12.3	11.2	7.3	6.6	5.7	5.8	8.9	8.7	6.7	6.5	2.6	2.9	-	-	10.8	10.8
ed	53	371,828	162	1,134,746	163	1,138,472	76	522,034	82	565,451	41	278,103	83	565,908	38	261,863	61	431,615	759	5,260,020
"	78	75.6	83.5	83.2	87.7	88.8	92.7	93.4	94.3	94.2	91.1	91.3	93.3	93.5	97.4	97.1	100	100	89.2	89.2
d	7	43,079	93⅓	674,429	27	188,627	11	71,754	9	63,938	18½	119,849	13	85,881	5	32,787	19	131,660	203	1,412,004
"	13.2	11.6	57.6	59.4	16.6	11.6	14.5	13.7	11.0	11.5	45.1	43.1	15.7	15.2	13.2	12.5	31.2	30.5	26.8	26.8
ned	46	328,749	68½	460,317	136	949,845	65	450,280	73	491,513	22½	158,254	70	480,027	33	229,076	42	299,955	556	3,848,016
"	86.8	88.4	42.4	40.6	83.4	83.4	85.5	86.3	89.0	88.5	54.9	56.9	84.3	84.8	86.8	87.5	68.8	69.5	73.2	73.2
	31	120,500	287	1,033,638	254	912,813	180	625,128	161	557,594	100	352,597	166	587,874	64	221,218	90	306,228	1333	4,717,590
ned	12	46,224	91	316,680	63	222,740	30	94,153	29	96,337	19	64,173	44	150,477	7	24,983	2	5,873	297	1,021,640
"	38.7	38.4	31.7	30.6	24.8	24.4	16.7	15.1	18.0	17.3	19.0	18.2	26.5	25.6	10.9	11.3	2.2	1.9	22.3	21.7
ed	19	74,276	198	716,958	191	690,073	150	530,975	132	461,257	81	288,424	122	437,397	57	196,235	88	300,355	1038	3,695,950
"	61.3	61.6	68.3	69.4	75.2	75.6	83.3	84.9	82.0	82.7	81.0	81.8	73.5	74.4	89.1	88.7	97.8	98.1	77.7	78.3
d	5	18,830	90	319,815	20½	78,906	11	43,803	22	77,836	24	83,847	19½	77,659	9	34,874	21½	73,374	222½	808,944
"	26.3	25.4	45.9	44.6	10.7	11.4	7.3	8.3	16.6	16.9	29.6	29.1	16.0	17.8	15.8	17.8	24.5	24.4	21.5	21.9
ned	14	55,446	106	397,143	170½	611,167	139	487,172	110	383,421	57	204,577	102½	359,738	48	161,361	66⅔	226,981	813⅓	2,887,006
"	73.7	74.6	54.1	55.4	89.3	88.6	92.7	91.7	83.4	83.1	70.4	70.9	84.0	82.2	84.2	82.2	75.5	75.6	78.5	78.1

TABULATION SHOWING WATERWORKS OWNERSHIP BY PLACES OF 2,500 POPULATION AND OVER
Arranged by States in Regional Divisions. (U.S. 1930 Census)

For explanation of Method of Compilation and References as to Source Material, see notations following Table I-(B)

Regions and States	TOTALS - 2,500 and Over									25,000 and Over										10,000 to 25,000										5,000 to 10				
	Total Places	Less Undetermined		Total Determined		Privately Owned		Municipally Owned		Total Places	Less Undetermined		Total Determined		Privately Owned		Municipally Owned			Total Places	Less Undetermined		Total Determined		Privately Owned		Municipally Owned			Total Places	Less Undetermined		Total Determin	
		Places	%	Places	%	Places	%	Places	%		Places	%	Places	%	Places	%	Places	%			Places	%	Places	%	Places	%	Places	%			Places	%		
New England																																		
Maine	26	8	30.8	18	69.2	6	33.3	12	66.7	3	-	-	3	100	-	-	3	100		6	1	16.7	5	83.3	2	40	3	60		9	3	33.3	6	66.7
New Hampshire	18	-	-	18	100	4	22.2	14	77.8	3	-	-	3	100	1	33.3	2	66.7		7	-	-	7	100	1	14.3	6	85.7		4	-	-	4	100
Vermont	14	1	7.1	13	92.9	-	-	13	100	-	-	-	-	-	-	-	-	-		3	-	-	3	100	-	-	3	100		7	-	-	7	100
Massachusetts	122	16	13.1	106	86.9	5	4.7	101	95.3	30	-	-	30	100	-	-	30	100		43	-	-	43	100	4	9.3	39	90.7		39	11	28.2	28	71.8
Rhode Island	19	1	5.3	18	94.7	6	33.3	12	66.7	7	-	-	7	100	2	28.6	5	71.4		7	1	14.3	6	85.7	2	33.3	4	66.7		4	-	-	4	100
Connecticut	33	3	9.1	30	90.9	12	40	18	60	12	-	-	12	100	5	41.7	7	58.3		12	-	-	12	100	4	33.3	8	66.7		5	1	20	4	80
Totals	232	29	12.5	203	87.5	33	16.3	170	83.7	55	-	-	55	100	8	14.4	47	85.6		78	2	2.6	76	97.4	13	17.1	63	82.9		68	16	22	53	78
Middle Atlantic																																		
New York	196	26	13.2	170	86.8	30-1/2	18.0	139-1/2	82.0	23	-	-	23	100	2	8.7	21	91.3		47	-	-	47	100	9	19.1	38	80.9		41	5	12.2	36	87.8
New Jersey	169	16	9.5	153	90.5	78	51	75	49	26	-	-	26	100	9	34.6	17	65.4		40	1	2.5	39	97.5	21	53.8	18	46.2		50	6	12	44	88
Pennsylvania	354	91	25.7	263	74.3	175	66.5	88	33.5	27	2	7.4	25	92.6	13	52.0	12	48.0		76	7	9.3	69	90.7	46	67.6	22	32.4		103	21	20.4	82	79.6
Totals	719	133	18.5	586	81.5	283-1/2	48.3	302-1/2	51.7	76	2	2.6	74	97.4	24	32.4	50	67.6		162	8	4.9	154	95.1	76	49.3	78	50.7		194	32	16.5	162	83.5
East North Central																																		
Ohio	174	16	9.4	158	90.6	20	12.7	138	87.3	26	-	-	26	100	2	7.7	24	92.3		33	1	3.0	32	97.0	4	12.5	28	87.5		51	5	9.8	46	90.2
Indiana	96	16	16.8	79	83.2	25	31.6	54	68.4	17	-	-	17	100	7	41.2	10	58.8		17	-	-	17	100	5	29.4	12	70.6		27	4	14.8	23	85.2
Illinois	192	28	14.6	164	85.4	36	21.9	128	78.1	24	-	-	24	100	6	25	18	75		34	-	-	34	100	13-1/2	39.7	20-1/2	60.3		56	7	12.5	49	87.5
Michigan	114	16	14.0	98	86.0	1	1	97	99	17	-	-	17	100	-	-	17	100		23	-	-	23	100	-	-	23	100		32	6	18.7	26	81.3
Wisconsin	83	11	13.3	72	86.7	7	9.7	65	90.3	12	-	-	12	100	1	7.7	12	92.3		14	-	-	14	100	3	21.4	11	78.6		20	1	5	19	95
Totals	658	87	13.2	571	86.8	89	15.6	482	84.4	97	-	-	97	100	16	16.5	81	83.5		121	1	0.8	120	99.2	25-1/2	21.3	94-1/2	78.7		186	23	12.3	163	87.7
West North Central																																		
Minnesota	73	12	16.4	61	83.6	1	1.6	60	98.4	3	-	-	3	100	-	-	3	100		11	-	-	11	100	-	-	11	100		18	-	-	18	100
Iowa	81	8	9.9	73	90.1	13	17.8	60	82.2	10	-	-	10	100	3	30	7	70		11	-	-	11	100	3	27.3	8	72.7		14	1	7.1	13	92.9
Missouri	72	8	11.1	64	88.9	15	23.4	49	76.6	6	-	-	6	100	3	50	3	50		10	-	-	10	100	4	40	6	60		21	2	9.5	19	90.5
North Dakota	12	1	8.3	11	91.7	1	9.1	10	90.9	1	-	-	1	100	-	-	1	100		3	-	-	3	100	-	-	3	100		6	1	16.7	5	83.3
South Dakota	16	2	12.5	14	87.5	1	7.1	13	92.9	1	-	-	1	100	-	-	1	100		5	-	-	5	100	-	-	5	100		2	-	-	2	100
Nebraska	35	3	8.6	32	91.4	3	9.4	29	90.6	2	-	-	2	100	-	-	2	100		6	-	-	6	100	-	-	6	100		9	1	11.1	8	88.9
Kansas	62	2	3.2	60	96.8	4	6.7	56	93.3	4	-	-	4	100	2	50	2	50		16	-	-	16	100	1	6.3	15	93.7		12	1	8.3	11	91.7
Totals	351	36	10.3	316	89.7	38	12.1	277	87.9	27	-	-	27	100	8	29.6	19	70.4		62	-	-	62	100	8	12.9	54	87.1		82	6	7.3	76	92.7
South Atlantic																																		
Delaware	5	2	40	3	60	-	-	3	100	1	-	-	1	100	-	-	1	100		-	-	-	-	-	-	-	-	-		-	-	-	-	-
Maryland	21	1	4.8	20	95.2	1	5	19	95	3	-	-	3	100	-	-	3	100		3	-	-	3	100	-	-	3	100		3	-	-	3	100
Dist. of Columbia	1	-	-	1	100	-	-	1	100	1	-	-	1	100	-	-	1	100		-	-	-	-	-	-	-	-	-		-	-	-	-	-
Virginia	45	7	15.6	38	84.4	5	13.2	33	86.8	7	-	-	7	100	1	14.3	6	85.7		9	-	-	9	100	2	22.2	7	77.8		10	2	20	8	80
West Virginia	39	7	17.9	32	82.1	19	59.4	13	40.6	5	-	-	5	100	2	40	3	60		5	-	-	5	100	3	60	2	40		12	1	8.3	11	91.7
North Carolina	68	2	2.9	66	97.1	4	6.1	62	93.9	8	-	-	8	100	-	-	8	100		13	-	-	13	100	-	-	13	100		17	-	-	17	100
South Carolina	40	3	7.5	37	92.5	2	5.4	35	94.6	4	-	-	4	100	-	-	4	100		5	-	-	5	100	1	20	4	80		12	-	-	12	100
Georgia	64	3	4.7	61	95.3	6	9.8	56	90.2	5	-	-	5	100	-	-	5	100		10	-	-	10	100	1	10	9	90		16	2	12.5	14	87.5
Florida	58	9	15.5	49	84.5	4-1/2	9.2	44-1/2	90.8	7	-	-	7	100	1/2	7.2	6-1/2	92.8		7	-	-	7	100	-	-	7	100		15	3	20	12	80
Totals	341	34	10.0	307	90.0	41-1/2	13.6	265-1/2	86.5	41	-	-	41	100	3-1/2	8.5	37-1/2	91.5		52	-	-	52	100	7	13.5	45	86.5		87	5	5.7	82	94.3
East South Central																																		
Kentucky	53	5	9.4	48	90.6	20	41.7	28	58.3	6	-	-	6	100	2	33.3	4	66.7		7	-	-	7	100	2	28.6	5	71.4		15	1	6.2	15	93.8
Tennessee	48	1	2.1	47	97.9	12	25.5	35	74.5	5	-	-	5	100	1	20	4	80		3	-	-	3	100	-	-	3	100		14	-	-	14	100
Alabama	53	12	22.6	41	77.4	19-1/2	47.6	21-1/2	52.4	3	-	-	3	100	1	33.3	2	66.7		11	-	-	11	100	4	36.4	7	63.6		11	3	27.3	8	72.7
Mississippi	39	5	12.8	34	87.2	1	2.9	33	97.1	2	-	-	2	100	-	-	2	100		11	-	-	11	100	-	-	11	100		4	-	-	4	100
Totals	193	23	11.9	170	88.1	52-1/2	30.9	117-1/2	69.1	16	-	-	16	100	4	25.0	12	75.0		32	-	-	32	100	6	18.8	26	81.2		44	4	8.9	41	91.1
West South Central																																		
Arkansas	49	13	26.5	36	73.5	18	50	18	50	3	-	-	3	100	1	33.3	2	66.7		6	-	-	6	100	5	83.3	1	16.7		9	2	22.2	7	77.8
Louisiana	48	14	29.2	34	70.8	5-1/2	16.2	28-1/2	83.8	4	-	-	4	100	1	25	3	75		4	-	-	4	100	1	25	3	75		11	1	9.1	10	90.9
Oklahoma	63	3	4.4	60	95.6	2	3.1	63	96.9	4	-	-	4	100	-	-	4	100		12	-	-	12	100	1	8.3	11	91.7		22	2	9.1	20	90.9
Texas	159	20	12.6	139	87.4	20	14.4	119	85.6	16	-	-	16	100	3	18.8	13	81.2		20	-	-	20	100	1	5	19	95		47	1	2.1	46	97.9
Totals	324	50	15.4	274	84.6	45-1/2	16.6	228-1/2	83.4	27	-	-	27	100	5	18.5	22	81.5		42	-	-	42	100	8	19.1	34	80.9		89	6	6.7	83	93.3
Mountain																																		
Montana	18	-	-	18	100	4	22.2	14	77.8	2	-	-	2	100	1	50	1	50		4	-	-	4	100	2	50	2	50		6	-	-	6	100
Idaho	21	2	9.5	19	90.5	4	21	15	79	-	-	-	-	-	-	-	-	-		2	-	-	2	100	1	50	1	50		5	-	-	5	100
Wyoming	8	-	-	8	100	3	37.5	5	62.5	-	-	-	-	-	-	-	-	-		2	-	-	2	100	-	-	2	100		3	-	-	3	100
Colorado	27	1	3.7	26	96.3	-	-	26	100	3	-	-	3	100	-	-	3	100		5	-	-	5	100	-	-	5	100		10	-	-	10	100
New Mexico	16	2	12.5	14	87.5	3	21.4	11	78.6	1	-	-	1	100	-	-	1	100		2	-	-	2	100	1	50	1	50		4	-	-	4	100
Arizona	14	2	14.3	12	85.7	2	16.7	10	83.3	2	-	-	2	100	-	-	2	100		-	-	-	-	-	-	-	-	-		6	1	16.7	5	83.3
Utah	21	-	-	21	100	1	4.8	20	95.2	2	-	-	2	100	-	-	2	100		1	-	-	1	100	-	-	1	100		4	-	-	4	100
Nevada	5	1	20	4	80	3	75	1	25	-	-	-	-	-	-	-	-	-		1	-	-	1	100	1	100	-	-		1	-	-	1	100
Totals	130	8	6.2	122	93.8	20	16.4	102	83.6	10	-	-	10	100	1	10	9	90		17	-	-	17	100	5	29.4	12	70.6		39	1	2.6	38	97.4
Pacific																																		
Washington	38	2	5.3	36	94.7	4	11.1	32	88.9	5	-	-	5	100	-	-	5	100		10	-	-	10	100	2	20	8	80		4	-	-	4	100
Oregon	28	-	-	28	100	7-1/2	26.8	20-1/2	73.2	2	-	-	2	100	1	50	1	50		4	-	-	4	100	1	25	3	75		9	-	-	9	100
California	155	-	-	155	100	39	25.2	116	74.8	21	-	-	21	100	3	14.3	18	85.7		28	-	-	28	100	3	10.7	25	89.3		48	-	-	48	100
Totals	221	2	0.9	219	99.1	50-1/2	23.1	168-1/2	76.9	28	-	-	28	100	4	14.3	24	85.7		42	-	-	42	100	6	14.3	36	85.7		61	-	-	61	100
U.S. Totals	3,169	402	12.7	2,767	87.3	653-1/2	23.6	2,113-1/2	76.4	377	2	0.5	375	99.5	73-1/2	19.6	301-1/2	80.4		608	11	1.8	597	98.2	154-1/2	25.9	442-1/2	74.1		851	92	10.8	759	89.2

TABULATION SHOWING WATERWORKS OWNERSHIP BY PLACES OF 2,500 POPULATION AND OVER
Arranged by States in Regional Divisions. (U.S. 1930 Census)

TABLE I-(A)

For explanation of Method of Compilation and References as to Source Material, see notations following Table I-(B)

25,000 and Over								10,000 to 25,000								5,000 to 10,000								2,500 to 5,000							
Less Undetermined		Total Determined		Privately Owned		Municipally Owned		Total Places	Less Undetermined		Total Determined		Privately Owned		Municipally Owned		Total Places	Less Undetermined		Total Determined		Privately Owned		Municipally Owned		Total Places	Less Undetermined		Total Determined		Privately Owned		Municipally Owned	
Places		Places	%	Places	%	Places	%		Places	%	Places	%	Places	%	Places	%		Places	%	Places	%	Places	%	Places	%		Places	%	Places	%	Places	%	Places	%
-	-	3	100	-	-	3	100	6	1	16.7	5	83.3	2	40	3	60	9	3	33.3	6	66.7	2	33.3	4	66.7	8	4	50	4	50	2	50	2	50
-	-	3	100	1	33.3	2	66.7	7	-	-	7	100	1	14.3	6	85.7	4	-	-	4	100	1	25	3	75	4	-	-	4	100	1	25	3	75
-	-	-	-	-	-	-	-	3	-	-	3	100	-	-	3	100	7	-	-	7	100	-	-	7	100	4	1	25	3	75	-	-	3	100
-	-	30	100	-	-	30	100	43	-	-	43	100	4	9.3	39	90.7	39	11	28.2	28	71.8	1	2.6	27	96.4	10	5	50	5	50	-	-	5	100
-	-	7	100	2	28.6	5	71.4	7	1	14.3	6	85.7	2	33.3	4	66.7	4	-	-	4	100	1	25	3	75	1	-	-	1	100	1	100	-	-
-	-	12	100	5	41.7	7	58.3	12	-	-	12	100	4	33.3	8	66.7	5	1	20	4	80	1	20	4	80	4	2	50	2	50	1	50	1	50
-	-	55	100	8	14.4	47	85.6	78	2	2.6	76	97.4	13	17.1	63	82.9	68	15	22	53	78	7	13.2	46	86.8	31	12	38.7	19	61.3	5	26.3	14	73.7
-	-	23	100	2	8.7	21	91.3	47	-	-	47	100	9	19.1	38	80.9	41	5	12.2	36	87.8	7-1/2	20.8	28-1/2	79.2	85	21	24.7	64	75.3	12	18.8	52	81.2
-	-	26	100	9	34.6	17	65.4	40	1	2.5	39	97.5	21	53.8	18	46.2	50	6	12	44	88	25	56.8	19	43.2	53	9	17.0	44	83	23	52.3	21	47.7
2	7.4	25	92.6	13	52.0	12	48.0	75	7	9.3	68	90.7	46	67.6	22	32.4	103	21	20.4	82	79.6	61	74.4	21	25.6	149	61	40.9	88	59.1	55	62.5	33	37.5
2	2.6	74	97.4	24	32.4	50	67.6	162	8	4.9	154	95.1	76	49.3	78	50.7	194	32	16.5	162	83.5	63-1/2	57.8	68-1/2	42.4	287	91	31.7	196	68.3	90	46.9	106	53.1
-	-	26	100	2	7.7	24	92.3	33	1	3.0	32	97.0	4	12.5	28	87.5	51	5	9.8	46	90.2	8	17.4	38	82.6	84	10	11.9	84	88.1	8	11.1	48	88.9
-	-	17	100	7	41.2	10	58.8	17	-	-	17	100	5	29.4	12	70.6	27	4	14.8	23	85.2	8	34.8	15	65.2	34	12	35.3	22	64.7	5	22.7	17	77.3
-	-	24	100	6	25	18	75	34	-	-	34	100	13-1/2	39.7	20-1/2	60.3	56	7	12.5	49	87.5	10	20.4	39	79.6	73	21	28.9	57	78.1	6-1/2	11.4	50-1/2	88.6
-	-	17	100	-	-	17	100	23	-	-	23	100	-	-	23	100	32	6	18.7	26	81.3	-	-	26	100	42	10	23.8	32	76.2	1	3.1	31	96.9
-	-	13	100	1	7.7	12	92.3	14	-	-	14	100	3	21.4	11	78.6	20	1	5	19	95	1	5.3	18	94.7	36	10	27.8	26	72.2	2	7.7	24	92.3
-	-	97	100	16	16.5	81	83.5	121	1	0.8	120	99.2	25-1/2	21.3	94-1/2	78.7	136	28	12.3	163	87.7	27	16.6	136	83.4	254	65	24.8	191	75.2	20-1/2	10.7	170-1/2	89.3
-	-	3	100	-	-	3	100	11	-	-	11	100	-	-	11	100	18	-	-	18	100	1	5.6	17	94.4	41	12	29.3	29	70.7	-	-	29	100
-	-	10	100	3	30	7	70	11	-	-	11	100	3	27.3	8	72.7	14	1	7.1	13	92.9	3	23.1	10	76.9	46	7	15.2	39	84.8	4	10.3	35	89.7
-	-	6	100	3	50	3	50	10	-	-	10	100	4	40	6	60	21	2	9.5	19	90.5	3	15.8	16	84.2	35	6	17.2	29	82.8	5	17.2	24	82.8
-	-	1	100	-	-	1	100	3	-	-	3	100	-	-	3	100	6	1	16.7	5	83.3	1	20	4	80	2	-	-	2	100	-	-	2	100
-	-	1	100	-	-	1	100	5	-	-	5	100	-	-	5	100	2	-	-	2	100	1	50	1	50	8	2	25	6	75	-	-	8	100
-	-	2	100	-	-	2	100	6	-	-	6	100	-	-	6	100	9	1	11.1	8	88.9	2	25	6	75	18	2	11.1	16	88.9	1	5.3	15	83.7
-	-	4	100	2	50	2	50	16	-	-	16	100	1	6.3	15	93.7	12	1	8.3	11	91.7	-	-	11	100	30	1	3.3	29	96.7	1	3.4	28	96.6
-	-	27	100	8	29.6	19	70.4	62	-	-	62	100	8	12.9	54	87.1	82	8	7.3	76	92.7	11	14.5	65	85.5	180	30	16.7	150	83.3	11	7.3	139	92.7
-	-	1	100	-	-	1	100	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	4	2	50	2	50	-	-	2	100
-	-	3	100	-	-	3	100	3	-	-	3	100	-	-	3	100	3	-	-	3	100	1	33.3	2	66.7	12	1	8.3	11	91.7	-	-	11	100
-	-	1	100	-	-	1	100	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
-	-	7	100	1	14.3	6	85.7	9	-	-	9	100	2	22.2	7	77.8	10	2	20	8	80	-	-	8	100	19	5	26.3	14	73.7	2	14.3	12	85.7
-	-	5	100	2	40	3	60	5	-	-	5	100	3	60	2	40	12	1	8.3	11	91.7	6	54.5	5	45.5	17	6	35.3	11	64.7	8	72.7	3	27.3
-	-	8	100	-	-	8	100	13	-	-	13	100	-	-	13	100	17	-	-	17	100	-	-	17	100	30	2	6.7	28	93.3	4	14.3	24	85.7
-	-	4	100	-	-	4	100	5	-	-	5	100	1	20	4	80	12	-	-	12	100	1	8.3	11	91.7	19	3	15.8	16	84.2	-	-	16	100
-	-	5	100	-	-	5	100	10	-	-	10	100	1	10	9	90	16	1	6.2	15	93.8	-	-	15	100	33	2	6.1	31	93.9	5	16.1	26	83.9
-	-	7	100	1/2	7.2	6-1/2	92.8	7	-	-	7	100	-	-	7	100	17	1	5.9	16	94.1	1	6.3	15	93.7	27	8	29.6	19	70.4	3	15.9	16	84.2
-	-	41	100	3-1/2	8.6	37-1/2	91.5	52	-	-	52	100	7	13.5	45	86.5	87	5	5.7	82	94.3	9	11.0	73	89.0	181	29	16.0	152	84.0	22	14.6	110	85.4
-	-	6	100	2	33.3	4	66.7	7	-	-	7	100	2	28.6	5	71.4	16	1	6.2	15	93.8	9	60	6	40	24	4	16.7	20	83.3	7	35	13	65
-	-	5	100	1	20	4	80	3	-	-	3	100	-	-	3	100	14	-	-	14	100	6	42.9	8	57.1	26	1	3.8	25	96.2	5	20	20	80
-	-	3	100	1	33.3	2	66.7	11	-	-	11	100	4	36.4	7	63.6	11	3	27.3	8	72.7	2-1/2	31.3	5-1/2	68.7	28	9	32.1	19	67.9	12	63.2	7	36.8
-	-	2	100	-	-	2	100	11	-	-	11	100	-	-	11	100	4	-	-	4	100	1	25	3	75	22	5	22.7	17	77.3	-	-	17	100
-	-	16	100	4	26.0	12	75.0	32	-	-	32	100	6	18.8	26	81.2	45	4	8.9	41	91.1	16-1/2	44.1	22-1/2	54.9	100	19	19.0	81	81.0	24	29.6	57	70.4
-	-	3	100	1	33.3	2	66.7	6	-	-	6	100	5	83.3	1	16.7	9	2	22.2	7	77.8	2	28.6	5	71.4	31	11	35.5	20	64.5	10	50	10	50
-	-	4	100	1	25	3	75	4	-	-	4	100	1	25	3	75	11	1	9.1	10	90.9	1	10	9	90	29	13	44.8	16	55.2	2-1/2	15.6	13-1/2	84.4
-	-	4	100	-	-	4	100	12	-	-	12	100	1	8.3	11	91.7	22	2	9.1	20	90.9	1	5	19	95	30	1	3.3	29	96.7	-	-	29	100
-	-	16	100	3	18.9	13	81.2	20	-	-	20	100	1	5	19	95	47	1	2.1	46	97.9	9	19.6	37	80.4	78	19	25	57	75	7	12.5	50	87.7
-	-	27	100	5	18.5	22	81.5	42	-	-	42	100	8	19.1	34	80.9	89	6	6.7	83	93.3	15	16.7	70	83.3	166	44	26.5	122	73.5	19-1/2	15.0	102-1/2	85.0
-	-	2	100	1	50	1	50	4	-	-	4	100	2	50	2	50	6	-	-	6	100	-	-	6	100	6	-	-	6	100	1	16.7	5	83.3
-	-	-	-	-	-	-	-	2	-	-	2	100	1	50	1	50	5	-	-	5	100	1	20	4	80	14	2	14.3	12	85.7	2	16.7	10	83.3
-	-	-	-	-	-	-	-	2	-	-	2	100	-	-	2	100	3	-	-	3	100	1	33.3	2	66.7	3	-	-	3	100	2	66.7	1	33.3
-	-	-	-	-	-	-	-	2	-	-	2	100	-	-	2	100	10	-	-	10	100	-	-	10	100	9	1	11.1	8	88.9	-	-	8	100
-	-	3	100	-	-	3	100	5	-	-	5	100	-	-	5	100	4	-	-	4	100	1	25	3	75	9	2	22.2	7	77.8	1	14.3	6	85.7
-	-	1	100	-	-	1	100	2	-	-	2	100	1	50	1	50	4	-	-	4	100	1	20	4	80	6	1	16.7	5	83.3	1	20	4	80
-	-	2	100	-	-	2	100	-	-	-	-	-	-	-	-	-	6	1	16.7	5	83.3	1	20	4	80	6	1	16.7	5	83.3	1	8.3	11	91.7
-	-	2	100	-	-	2	100	1	-	-	1	100	-	-	1	100	4	-	-	4	100	-	-	4	100	14	-	-	14	100	1	7.1	13	92.9
-	-	-	-	-	-	-	-	1	-	-	1	100	1	100	-	-	1	-	-	1	100	1	100	-	-	3	1	33.3	2	66.7	1	50	1	50
-	-	10	100	1	10	9	90	17	-	-	17	100	5	29.4	12	70.6	39	1	2.6	38	97.4	5	13.2	33	86.8	64	7	10.9	57	89.1	9	13.8	48	86.2
-	-	5	100	-	-	5	100	10	-	-	10	100	2	20	8	80	4	-	-	4	100	-	-	4	100	19	2	10.5	17	89.5	2	11.8	15	88.2
-	-	2	100	1	50	1	50	4	-	-	4	100	1	25	3	75	9	-	-	9	100	2	22.2	7	77.8	13	-	-	13	100	3-1/2	26.9	9-1/2	73.1
-	-	21	100	3	14.3	18	85.7	28	-	-	28	100	3	10.7	25	89.3	48	-	-	48	100	17	35.4	31	64.6	56	-	-	56	100	16	27.6	42	72.4
-	-	28	100	4	14.3	24	85.7	42	-	-	42	100	6	14.3	36	85.7	61	-	-	61	100	19	31.2	42	68.8	90	2	2.2	88	97.8	21-1/2	24.5	66-1/2	75.5
2	0.5	375	99.5	73-1/2	19.6	301-1/2	80.4	608	11	1.8	597	98.2	154-1/2	25.9	442-1/2	74.1	851	92	10.8	759	89.2	208	28.8	556	73.2	1,338	297	22.3	1,036	77.7	222-1/2	21.9	813-1/2	78.5

TABULATION SHOWING WATERWORKS OWNERSHIP BY POPULATION OF PLACES OF 2,500 AND OVER
Arranged by States in Regional Divisions. (U.S. 1930 Census)

For explanation of Method of Compilation and References as to Source Material, see notations following Table I-(B)

Population Groups / Regions and States	TOTALS - 2,500 and Over									25,000 and Over								10,000 to 25,000								5,000
	Total Population	Less Undetermined Population	%	Total Determined Population	%	Privately Owned Population	%	Municipally Owned Population	%	Total Population	Less Undetermined Population	%	Total Determined Population	%	Privately Owned Population	%	Municipally Owned Population	%	Total Population	Less Undetermined Population	%	Total Determined Population	%	Privately Owned Population	%	Municipally Owned Population	%	Total Population	Less Undetermined Population	%	Total Population
New England																														
Maine	321,808	52,754	16.4	268,752	83.6	47,225	17.6	221,527	82.4	134,507	-	-	134,507	100	-	-	134,507	100	92,803	13,940	14.8	79,663	85.2	28,440	35.7	51,223	64.3	84,962	24,130	37.2	40,83
New Hampshire	273,079	-	-	273,079	100	53,937	19.8	219,142	80.2	133,626	-	-	133,626	100	31,463	23.6	102,062	76.4	96,937	-	-	96,937	100	12,471	12.9	84,466	87.1	24,460	-	-	24,46
Vermont	118,766	3,689	3.1	115,077	96.9	-	-	115,077	100	-	-	-	-	-	-	-	-	-	53,411	-	-	53,411	100	-	-	53,411	100	80,278	-	-	80,27
Massachusetts	3,831,426	107,543	2.8	3,723,883	97.2	84,919	2.3	3,638,964	97.7	2,811,253	-	-	2,811,253	100	-	-	2,811,253	100	693,428	-	-	693,428	100	78,262	11.3	615,166	88.7	287,939	87,720	30.5	200,21
Rhode Island	635,429	10,421	1.6	625,008	98.4	109,000	17.4	516,008	82.6	505,922	-	-	505,922	100	70,523	13.9	435,399	86.1	95,671	10,421	10.9	85,250	89.1	29,649	34.8	55,601	65.2	30,170	-	-	30,17
Connecticut	1,131,770	16,811	1.4	1,115,959	98.6	489,414	43.9	626,545	56.1	872,258	-	-	872,258	100	407,666	46.7	464,593	53.3	209,500	-	-	209,500	100	84,213	30.7	146,287	69.3	33,752	7,883	23.4	25,8
Totals	6,311,976	190,218	3.0	6,121,758	97.0	784,495	12.8	5,337,263	87.2	4,457,465	-	-	4,457,465	100	509,651	11.4	3,947,914	88.6	1,242,450	24,261	2.0	1,218,189	98.0	213,035	17.5	1,005,154	82.5	491,661	119,733	24.4	371,92
Middle Atlantic																														
New York	10,321,962	108,214	1.0	10,213,738	99.0	386,613	3.7	10,027,125	96.3	9,204,899	-	-	9,204,899	100	155,740	1.7	9,049,159	98.3	730,349	-	-	730,349	100	131,059	17.9	599,290	82.1	277,831	33,684	12.1	244,14
New Jersey	3,339,244	82,228	2.5	3,254,016	97.5	1,141,704	35.1	2,112,312	64.9	2,190,396	-	-	2,190,396	100	539,654	24.6	1,650,742	75.4	609,321	13,339	2.2	595,982	97.8	347,291	58.3	248,691	41.7	351,371	43,510	12.4	307,86
Pennsylvania	6,533,811	385,347	5.4	6,148,464	91.6	2,043,338	34.2	3,934,826	65.8	4,104,363	81,792	2.0	4,022,571	98.0	694,549	17.3	3,328,022	82.7	1,157,220	107,972	9.3	1,050,017	90.7	709,118	67.5	340,899	32.5	734,549	151,811	20.7	582,73
Totals	20,394,707	748,789	3.7	19,646,918	96.3	3,571,655	18.2	16,074,263	81.8	15,499,658	81,792	0.5	15,417,866	99.5	1,389,943	9.0	14,027,923	91.0	2,497,860	121,312	4.9	2,376,548	95.1	1,187,468	49.9	1,188,980	50.1	1,363,961	229,005	16.8	1,134,74
East North Central																														
Ohio	4,507,371	81,847	1.8	4,425,524	98.2	204,018	4.6	4,221,506	95.4	3,398,785	-	-	3,398,785	100	57,484	1.7	3,341,281	98.3	617,498	13,899	2.7	603,599	97.3	69,318	13.8	434,281	86.2	359,925	31,111	8.6	328,81
Indiana	1,795,992	66,488	3.7	1,729,407	96.3	799,494	46.2	929,913	53.8	1,260,190	-	-	1,260,190	100	668,100	52.8	595,090	47.2	237,807	-	-	237,807	100	62,679	26.4	175,128	73.6	172,871	24,437	14.1	148,43
Illinois	5,836,727	113,210	2.0	5,822,517	98.0	597,197	10.6	4,925,320	89.2	4,486,441	-	-	4,486,441	100	299,787	6.7	4,186,654	93.3	482,439	-	-	482,439	100	199,430	41.3	283,009	58.6	393,926	40,716	10.3	353,21
Michigan	3,302,078	76,544	2.3	3,225,531	97.7	4,916	0.2	3,220,615	99.8	2,606,338	-	-	2,606,338	100	-	-	2,606,338	100	327,343	-	-	327,343	100	-	-	327,343	100	213,702	42,231	19.8	171,47
Wisconsin	1,932,843	42,410	2.7	1,811,433	97.3	99,786	6.6	1,411,647	93.4	1,059,127	-	-	1,059,127	100	36,113	3.4	1,023,014	96.6	223,821	-	-	223,821	100	47,967	21.4	175,854	78.6	141,905	5,362	3.7	136,54
Totals	16,794,908	380,496	2.3	16,414,412	97.7	1,705,411	10.4	14,709,001	89.6	12,810,888	-	-	12,810,888	100	1,056,484	8.2	11,752,374	91.7	1,788,908	13,899	0.8	1,775,009	99.2	379,394	21.4	1,395,615	78.6	1,282,329	143,857	11.2	1,139,47
West North Central																														
Minnesota	1,267,616	36,366	2.9	1,221,251	97.1	6,321	0.5	1,214,930	99.5	837,425	-	-	837,425	100	-	-	837,425	100	159,680	-	-	159,680	100	-	-	159,680	100	123,600	-	-	123,60
Iowa	979,292	27,722	2.8	951,570	97.2	195,787	20.6	755,813	79.2	549,064	-	-	549,064	100	113,232	20.6	435,832	79.4	167,406	-	-	167,406	100	44,228	26.4	123,180	73.6	94,173	5,019	5.3	89,15
Missouri	1,655,119	35,979	2.7	1,623,140	98.3	284,845	18.6	1,338,295	84.4	1,419,431	-	-	1,419,431	100	171,916	12.1	1,247,515	87.9	165,060	-	-	165,060	100	73,925	44.8	91,136	55.2	151,156	14,324	9.5	136,81
North Dakota	113,336	8,106	4.8	108,200	95.5	5,451	5.1	102,749	94.9	28,619	-	-	28,619	100	-	-	28,619	100	44,301	-	-	44,301	100	-	-	44,301	100	34,074	5,106	15.0	28,96
South Dakota	130,907	5,467	4.2	125,440	95.8	5,733	4.6	119,707	95.4	33,362	-	-	33,362	100	-	-	33,362	100	58,971	-	-	58,971	100	-	-	58,971	100	11,805	-	-	11,80
Nebraska	496,107	11,899	2.4	474,208	97.6	16,735	3.5	457,473	96.5	289,939	-	-	289,939	100	-	-	289,939	100	78,013	-	-	78,013	100	-	-	78,013	100	62,216	6,688	10.7	55,52
Kansas	729,834	8,300	1.1	721,534	98.9	185,232	25.8	536,302	74.2	324,172	-	-	324,172	100	135,195	42.6	188,977	57.4	216,992	-	-	216,992	100	13,024	6.0	203,968	94.0	61,815	5,548	8.8	76,26
Totals	5,856,181	130,838	2.4	5,425,343	97.6	670,074	12.4	4,755,269	87.6	3,482,012	-	-	3,482,012	100	423,343	12.2	3,058,669	87.8	890,322	-	-	890,322	100	131,174	14.7	759,148	85.3	558,719	36,685	6.6	522,03
South Atlantic																														
Delaware	123,148	8,050	6.5	115,116	93.5	-	-	115,116	100	106,597	-	-	106,597	100	-	-	106,597	100	-	-	-	-	-	-	-	-	-	-	-	-	-
Maryland	974,869	3,850	0.9	971,019	99.1	8,544	0.9	962,475	99.1	873,482	-	-	873,482	100	-	-	873,482	100	37,962	-	-	37,962	100	-	-	37,962	100	20,547	-	-	20,54
Dist. of Columbia	486,869	-	-	486,869	100	-	-	486,869	100	486,869	-	-	486,869	100	-	-	486,869	100	-	-	-	-	-	-	-	-	-	-	-	-	-
Virginia	788,537	29,685	3.8	758,852	96.2	111,241	14.7	644,611	85.3	531,191	-	-	531,191	100	89,206	13.0	461,985	87.0	118,830	-	-	118,830	100	35,476	29.9	83,354	70.1	68,993	14,239	20.6	54,75
West Virginia	491,804	27,949	5.7	463,855	94.3	259,868	56.0	203,990	44.0	256,128	-	-	256,128	100	135,980	53.1	120,148	46.9	87,952	-	-	87,952	100	49,956	56.8	38,016	43.2	88,750	5,904	6.9	79,84
North Carolina	809,847	6,138	0.8	803,712	99.2	16,034	2.0	787,678	98.0	420,142	-	-	420,142	100	-	-	420,142	100	172,672	-	-	172,672	100	-	-	172,672	100	113,693	-	-	113,69
South Carolina	371,080	8,234	2.2	362,846	97.8	19,939	5.5	342,907	94.5	171,725	-	-	171,725	100	-	-	171,725	100	83,279	-	-	83,279	100	14,383	22.7	48,896	77.3	73,855	-	-	73,85
Georgia	896,492	14,361	1.6	881,111	98.4	29,830	3.4	851,281	96.6	512,692	-	-	512,692	100	-	-	512,692	100	155,017	-	-	155,017	100	14,022	9.2	138,995	90.8	113,786	8,124	7.1	105,66
Florida	759,778	31,964	4.2	727,814	95.8	70,943	9.7	656,871	90.3	467,291	-	-	467,291	100	55,319	11.8	411,972	88.2	91,359	-	-	91,359	100	-	-	91,359	100	112,719	5,624	5.0	107,09
Totals	5,698,122	130,228	2.0	5,567,894	98.0	518,096	9.3	5,081,798	90.7	3,826,115	-	-	3,826,115	100	280,506	6.8	3,545,610	93.2	726,071	-	-	726,071	100	113,817	15.7	611,254	84.3	589,342	53,691	5.8	535,45
East South Central																														
Kentucky	799,028	20,868	2.6	778,178	97.4	187,707	24.1	590,471	75.9	511,092	-	-	511,092	100	79,277	15.5	431,815	84.5	89,511	-	-	89,511	100	21,976	24.6	67,535	75.4	112,451	8,036	7.1	104,41
Tennessee	896,538	2,902	0.3	893,636	99.7	178,542	20.0	715,094	80.0	657,689	-	-	657,689	100	119,798	18.2	537,891	81.8	46,091	-	-	46,091	100	-	-	46,091	100	99,184	-	-	99,18
Alabama	744,273	47,881	6.4	696,392	93.6	381,674	54.8	314,718	45.2	393,959	-	-	393,959	100	259,678	65.9	134,281	34.1	186,622	-	-	186,622	100	69,718	37.6	116,904	62.4	69,684	18,598	26.7	51,08
Mississippi	338,650	19,178	5.7	319,474	94.3	6,220	1.9	313,454	98.1	80,236	-	-	80,236	100	-	-	80,236	100	157,153	-	-	157,153	100	-	-	157,153	100	23,448	-	-	23,44
Totals	2,778,487	90,829	3.3	2,687,680	96.7	754,143	28.1	1,933,737	71.9	1,642,976	-	-	1,642,976	100	458,753	27.9	1,184,223	72.1	479,377	-	-	479,377	100	91,694	19.2	387,683	80.8	304,737	26,634	8.7	278,10
West South Central																														
Arkansas	382,878	47,872	12.5	335,006	87.5	218,655	65.3	116,351	34.7	123,872	-	-	123,872	100	81,679	65.9	42,193	34.1	97,281	-	-	97,281	100	86,935	89.4	10,328	10.6	56,416	14,324	25.4	42,09
Louisiana	833,532	41,430	5.2	792,102	95.8	83,570	8.1	716,532	91.9	592,174	-	-	592,174	100	30,729	5.2	561,445	94.8	67,480	-	-	67,480	100	15,791	23.4	51,689	76.6	72,564	6,299	8.7	66,26
Oklahoma	821,681	17,371	2.1	804,310	97.9	21,437	2.7	782,873	97.3	385,072	-	-	385,072	100	-	-	385,072	100	168,698	-	-	168,698	100	14,763	8.8	153,935	91.2	162,388	13,045	8.1	149,31
Texas	2,389,348	73,442	3.1	2,315,906	96.9	148,056	7.6	2,140,850	92.4	1,506,868	-	-	1,506,868	100	74,578	4.9	1,432,340	95.1	292,594	-	-	292,594	100	10,753	3.7	281,841	96.3	314,208	5,970	1.9	308,23
Totals	4,427,439	180,115	4.3	4,247,324	95.7	471,718	11.5	3,756,606	88.7	2,607,986	-	-	2,607,986	100	186,986	7.0	2,421,050	93.0	626,053	-	-	626,053	100	128,242	20.5	497,791	79.5	805,576	39,638	6.5	565,90
Mountain																														
Montana	181,036	-	-	181,036	100	70,193	39.8	110,843	61.2	88,354	-	-	88,354	100	39,532	57.8	28,822	42.2	55,334	-	-	55,334	100	27,181	49.2	28,183	50.8	38,245	-	-	38,24
Idaho	129,807	5,155	4.0	124,564	96.0	37,899	30.2	86,755	69.8	-	-	-	-	-	-	-	-	-	38,015	-	-	38,015	100	21,544	56.7	16,471	43.3	44,122	-	-	44,12
Wyoming	70,097	-	-	70,097	100	15,897	22.6	54,200	76.6	-	-	-	-	-	-	-	-	-	33,980	-	-	33,980	100	-	-	33,980	100	25,585	-	-	25,58
Colorado	519,882	3,771	0.7	516,111	99.3	-	-	516,111	100	371,194	-	-	371,194	100	-	-	371,194	100	56,894	-	-	56,894	100	-	-	56,894	100	60,916	-	-	60,91
New Mexico	106,816	9,097	8.5	97,719	91.5	22,911	23.4	74,808	76.6	26,670	-	-	26,670	100	-	-	26,670	100	22,349	-	-	22,349	100	11,176	50.0	11,173	50.0	25,920	-	-	25,92
Arizona	149,856	11,810	7.9	138,046	92.1	12,916	9.4	125,331	90.6	80,624	-	-	80,624	100	-	-	80,624	100	-	-	-	-	-	-	-	-	-	44,224	7,693	17.4	36,53
Utah	286,284	-	-	286,284	100	3,041	1.1	283,223	98.9	180,539	-	-	180,539	100	-	-	180,539	100	14,766	-	-	14,766	100	-	-	14,766	100	25,379	-	-	25,37
Nevada	34,464	3,048	8.8	31,419	91.2	23,037	73.3	8,382	26.7	-	-	-	-	-	-	-	-	-	18,529	-	-	18,529	100	18,529	100	-	-	5,165	-	-	5,16
Totals	1,487,922	32,878	2.2	1,425,248	97.8	185,893	13.1	1,239,655	86.9	727,281	-	-	727,281	100	39,532	5.4	687,749	94.6	239,867	-	-	239,867	100	78,400	32.7	161,467	67.3	289,556	7,693	2.9	261,06
Pacific																														
Washington	883,993	5,873	0.7	878,120	99.3	32,007	3.6	846,113	96.4	648,784	-	-	648,784	100	-	-	648,784	100	142,696	-	-	142,696	100	26,418	18.5	116,278	81.5	27,976	-	-	27,97
Oregon	489,768	-	-	489,768	100	68,872	13.8	423,874	86.8	328,081	-	-	328,081	100	26,268	8.0	301,813	92.0	56,350	-	-	56,350	100	16,093	28.6	40,257	71.4	61,218	-	-	61,21
California	4,180,896	-	-	4,180,896	100	347,237	8.3	3,813,359	91.7	3,211,141	-	-	3,211,141	100	131,629	4.1	3,079,512	95.9	409,460	-	-	409,460	100	39,676	9.7	369,784	90.3	342,421	-	-	342,42
Totals	5,554,657	5,873	0.1	5,548,784	99.9	448,116	8.1	5,083,346	91.9	4,187,986	-	-	4,187,986	100	157,896	3.8	4,030,091	96.2	608,506	-	-	608,506	100	82,187	13.5	526,319	86.5	431,615	-	-	431,61
U. S. Totals	88,954,277	1,900,040	2.8	87,054,237	97.2	9,111,801	13.6	77,942,436	86.4	49,242,337	81,792	0.2	49,160,545	99.8	4,404,942	9.1	44,675,603	90.9	9,097,194	169,472	1.8	8,927,722	98.2	2,405,411	26.9	6,522,311	73.1	5,897,186	637,136	10.8	5,260,03

TABULATION SHOWING WATERWORKS OWNERSHIP BY POPULATION OF PLACES OF 2,500 AND OVER
Arranged by States in Regional Divisions. (U.S. 1930 Census)

For explanation of Method of Compilation and References as to Source Material, see notations following Table I-(B)

TABLE I-(B)

	25,000 and Over								10,000 to 25,000								5,000 to 10,000								2,500 to 5,000							
	Undetermined		Total Determined		Privately Owned		Municipally Owned		Total	Less Undetermined		Total Determined		Privately Owned		Municipally Owned		Total	Less Undetermined		Total Determined		Privately Owned		Municipally Owned		Total	Less Undetermined		Total Determined		Privately Owned		Municipally Owned	
	Population	%	Population	%	Population	%	Population	%	Population	Population	%	Population	%	Population	%	Population	%	Population	Population	%	Population	%	Population	%	Population	%	Population	Population	%	Population	%	Population	%	Population	%
	-	-	134,507	100	-	-	134,507	100	93,503	13,840	14.8	79,663	85.2	28,440	35.7	51,223	64.3	64,962	24,130	37.2	40,832	62.8	12,703	31.1	28,129	68.9	28,534	14,784	51.8	13,750	48.2	5,082	44.2	7,668	55.8
	-	-	133,525	100	31,463	23.6	102,062	76.4	96,937	-	-	96,937	100	12,471	12.9	84,466	87.1	24,460	-	-	24,460	100	5,131	21.0	19,329	79.0	18,157	-	-	18,157	100	4,872	26.8	13,285	73.2
	-	-	-	-	-	-	-	-	53,411	-	-	53,411	100	-	-	53,411	100	50,278	-	-	50,278	100	-	-	50,278	100	15,077	3,689	24.5	11,388	75.5	-	-	11,388	100
	-	-	2,811,253	100	-	-	2,811,253	100	693,428	-	-	693,428	100	78,262	11.3	615,166	88.7	287,939	87,720	30.5	200,219	69.5	6,657	3.3	193,562	96.7	38,806	19,823	51.1	18,983	48.9	-	-	18,983	100
	-	-	508,922	100	70,523	13.9	438,399	86.1	95,671	10,421	10.9	85,250	89.1	29,649	34.8	55,601	65.2	30,170	-	-	30,170	100	-	-	30,170	100	3,666	-	-	3,666	100	3,666	100	-	-
	-	-	872,258	100	407,565	46.7	464,693	53.3	209,500	-	-	209,500	100	64,213	30.7	145,287	69.3	33,752	7,883	23.4	25,869	76.6	13,426	51.9	12,443	48.1	16,260	7,928	48.8	8,332	51.2	4,210	50.5	4,122	49.5
	-	-	4,457,465	100	509,551	11.4	3,947,914	88.6	1,242,450	24,261	2.0	1,218,189	98.0	213,035	17.5	1,005,154	82.5	491,561	119,733	24.4	371,828	75.6	45,079	11.8	326,749	88.4	120,500	46,224	38.4	74,276	61.6	18,830	25.4	55,446	74.6
	-	-	9,204,899	100	155,740	1.7	9,049,159	98.3	730,349	-	-	730,349	100	131,059	17.9	599,290	82.1	277,831	33,684	12.1	244,147	87.9	52,254	21.4	191,893	78.6	308,873	74,530	24.1	234,343	75.9	47,560	20.3	186,783	79.7
	-	-	2,190,396	100	539,654	24.6	1,650,742	75.4	609,321	13,339	2.2	595,982	97.8	347,291	58.3	248,691	41.7	381,371	43,510	12.4	307,861	87.6	174,360	56.6	133,511	43.4	188,156	28,379	15.1	159,777	84.9	80,409	50.3	79,368	49.7
	81,792	2.0	4,022,871	98.0	694,549	17.3	3,328,022	82.7	1,157,990	107,973	9.3	1,050,017	90.7	709,118	67.6	340,899	32.5	734,549	181,811	20.7	552,738	79.3	447,825	76.8	134,913	23.2	536,609	213,771	39.8	322,838	60.2	191,846	59.4	130,992	40.6
	81,792	0.5	15,417,866	99.5	1,389,943	9.0	14,027,923	91.0	2,497,660	121,312	4.9	2,376,348	95.1	1,187,468	49.9	1,188,880	50.1	1,363,761	229,005	16.8	1,134,746	83.2	674,429	59.4	460,317	40.6	1,033,638	316,880	30.6	716,958	69.4	319,815	44.6	397,143	55.4
	-	-	3,398,765	100	57,484	1.7	3,341,281	98.3	517,498	13,899	2.7	503,599	97.3	69,318	13.8	434,281	86.2	359,925	31,111	8.6	328,814	91.4	54,745	16.6	274,069	83.4	231,183	36,837	15.9	194,346	84.1	22,471	11.6	171,875	88.4
	-	-	1,260,190	100	665,100	52.8	595,090	47.2	237,807	-	-	237,807	100	62,679	26.4	175,128	73.6	172,871	24,437	14.1	148,434	85.9	51,538	34.7	96,896	65.3	126,024	42,048	33.6	82,976	66.4	20,177	24.3	62,799	75.7
	-	-	4,486,441	100	299,787	6.7	4,186,654	93.3	482,439	-	-	482,439	100	199,430	41.3	283,009	58.6	693,926	69,716	10.3	383,210	89.7	73,886	20.9	279,324	79.1	272,921	72,494	26.6	200,427	73.4	24,094	12.0	176,333	88.0
	-	-	2,606,335	100	-	-	2,606,335	100	327,343	-	-	327,343	100	-	-	327,343	100	213,702	42,231	19.8	171,471	80.2	-	-	171,471	100	154,695	34,313	22.2	120,382	77.8	4,916	4.1	115,466	95.9
	-	-	1,059,127	100	36,113	3.4	1,023,014	96.6	223,821	-	-	223,821	100	47,967	21.4	175,854	78.6	141,805	5,362	3.7	136,543	96.3	6,458	4.2	128,085	93.8	128,990	37,048	28.7	91,942	71.3	7,248	7.9	84,694	92.1
	-	-	12,810,858	100	1,058,484	8.3	11,752,374	91.7	1,788,908	13,899	0.8	1,775,009	99.2	379,394	21.4	1,395,615	78.6	1,282,329	143,857	11.2	1,138,472	88.8	178,627	16.6	949,845	83.4	912,813	222,740	24.4	690,073	75.6	78,906	11.4	611,167	88.6
	-	-	837,425	100	-	-	837,425	100	159,580	-	-	159,580	100	-	-	159,580	100	123,500	-	-	123,500	100	6,321	5.1	117,179	94.9	137,111	36,365	26.5	100,746	73.5	-	-	100,746	100
	-	-	549,064	100	113,232	20.6	435,832	79.4	167,405	-	-	167,405	100	44,225	26.4	123,180	73.6	94,173	5,019	5.3	89,154	94.7	22,127	24.8	67,027	75.2	168,650	22,703	13.5	145,947	86.5	16,173	11.1	129,774	88.9
	-	-	1,419,431	100	171,916	12.1	1,247,515	87.9	165,060	-	-	165,060	100	73,925	44.8	91,135	55.2	151,136	14,324	9.5	136,812	90.5	19,180	14.0	117,632	86.0	123,492	21,668	17.6	101,837	82.4	19,824	19.5	82,013	80.5
	-	-	28,619	100	-	-	28,619	100	44,301	-	-	44,301	100	-	-	44,301	100	34,074	5,106	15.0	28,968	85.0	5,451	18.8	23,517	81.2	6,312	-	-	6,312	100	-	-	6,312	100
	-	-	33,362	100	-	-	33,362	100	58,971	-	-	58,971	100	-	-	58,971	100	11,805	-	-	11,805	100	5,733	48.6	6,072	51.4	26,789	5,467	20.4	21,302	79.6	-	-	21,302	100
	-	-	289,939	100	-	-	289,939	100	78,013	-	-	78,013	100	-	-	78,013	100	62,216	6,688	10.7	55,528	89.3	12,942	23.3	42,586	76.7	55,939	5,211	9.3	50,728	90.7	3,793	7.5	46,935	92.5
	-	-	324,172	100	138,195	42.6	185,977	57.4	216,992	-	-	216,992	100	13,024	6.0	203,968	94.0	81,815	5,548	6.8	76,267	93.2	-	-	76,267	100	106,858	2,752	2.6	104,103	97.4	4,013	3.9	100,090	96.1
	-	-	3,482,012	100	423,343	12.2	3,058,669	87.8	890,322	-	-	890,322	100	131,174	14.7	759,148	85.3	588,719	38,645	6.6	522,034	93.4	71,754	13.7	450,280	86.3	625,128	94,153	15.1	530,975	84.9	43,803	8.3	487,172	91.7
	-	-	106,597	100	-	-	106,597	100	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	16,549	8,030	48.5	8,519	51.5	-	-	8,519	100
	-	-	873,482	100	-	-	873,482	100	37,962	-	-	37,962	100	-	-	37,962	100	20,547	-	-	20,547	100	8,544	41.6	12,003	58.4	42,878	3,850	8.9	39,028	91.1	-	-	39,028	100
	-	-	486,869	100	-	-	486,869	100	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	-	-	531,191	100	69,206	13.0	461,985	87.0	118,830	-	-	118,830	100	35,476	29.9	83,354	70.1	68,993	14,239	20.6	54,754	79.4	-	-	54,754	100	66,823	16,446	23.2	51,077	76.8	6,559	12.8	44,518	87.2
	-	-	268,128	100	135,980	53.1	120,148	46.9	87,952	-	-	87,952	100	49,936	56.8	38,016	43.2	85,760	5,904	6.9	79,846	93.1	42,708	53.5	37,138	46.5	61,674	22,045	35.7	39,629	64.3	30,941	78.1	8,688	21.9
	-	-	420,142	100	-	-	420,142	100	172,672	-	-	172,672	100	-	-	172,672	100	113,693	-	-	113,693	100	-	-	113,693	100	103,340	6,135	5.9	97,205	94.1	16,034	16.5	81,171	83.5
	-	-	171,723	100	-	-	171,723	100	63,279	-	-	63,279	100	14,383	22.7	48,896	77.3	73,855	-	-	73,855	100	5,556	7.5	68,299	92.5	42,823	3,734	13.2	39,089	86.8	-	-	39,089	100
	-	-	512,692	100	-	-	512,692	100	153,017	-	-	153,017	100	14,022	9.2	138,995	90.8	113,786	8,124	7.1	105,661	92.9	-	-	105,661	100	115,992	8,257	6.4	109,741	94.6	15,808	14.4	93,933	85.6
	-	-	467,291	100	55,319	11.8	411,972	88.2	91,359	-	-	91,359	100	-	-	91,359	100	112,719	5,624	5.0	107,096	95.0	7,130	6.7	99,965	93.3	88,409	26,340	29.8	62,069	70.2	8,494	13.7	53,575	86.3
	-	-	3,826,115	100	260,505	6.8	3,565,610	93.2	725,071	-	-	725,071	100	113,817	15.7	611,254	84.3	589,342	33,891	5.8	555,451	94.2	63,938	11.5	491,513	88.5	587,594	98,337	17.3	489,257	82.7	77,836	16.9	383,421	83.1
	-	-	511,092	100	79,277	15.5	431,815	84.5	89,511	-	-	89,511	100	21,976	24.6	67,535	75.4	112,451	8,036	7.1	104,415	92.9	59,704	57.2	44,711	42.8	85,972	12,812	14.9	73,160	85.1	26,750	36.6	46,410	63.4
	-	-	537,689	100	119,798	18.2	537,891	81.8	46,091	-	-	46,091	100	-	-	46,091	100	99,184	-	-	99,184	100	39,789	40.1	59,395	59.9	93,574	2,902	3.1	90,672	96.9	18,956	20.9	71,717	79.1
	-	-	393,959	100	259,678	65.9	134,281	34.1	185,622	-	-	185,622	100	69,718	37.6	115,904	62.4	69,654	18,598	26.7	51,056	73.3	14,136	27.7	36,920	72.3	95,038	29,283	30.8	65,755	69.2	38,142	58.0	27,613	42.0
	-	-	80,236	100	-	-	80,236	100	157,153	-	-	157,153	100	-	-	157,153	100	23,448	-	-	23,448	100	6,220	26.5	17,228	73.5	78,013	19,176	24.6	58,837	75.4	-	-	58,837	100
	-	-	1,642,976	100	458,753	27.9	1,184,223	72.1	478,377	-	-	478,377	100	91,694	19.2	386,683	80.8	304,737	26,634	8.7	278,103	91.3	119,849	43.1	158,254	56.9	382,597	64,173	16.8	288,424	81.8	83,847	29.1	204,577	70.9
	-	-	123,872	100	81,679	65.9	42,193	34.1	97,261	-	-	97,261	100	86,935	89.4	10,326	10.6	56,416	14,324	25.4	42,092	74.6	12,901	30.6	29,191	69.4	105,329	33,548	31.9	71,781	68.1	37,140	51.7	34,641	48.3
	-	-	592,174	100	30,729	5.2	561,445	94.8	67,480	-	-	67,480	100	15,791	23.4	51,689	76.6	72,564	6,299	8.7	66,265	91.3	8,003	12.1	58,262	87.9	101,314	45,131	44.5	56,183	55.5	9,047	16.1	47,136	83.9
	-	-	385,072	100	-	-	385,072	100	168,698	-	-	168,698	100	14,783	8.8	153,915	91.2	182,388	13,045	8.1	149,343	91.9	6,804	4.6	142,539	95.5	105,553	4,326	4.1	101,227	98.9	-	-	101,227	100
	-	-	1,506,868	100	74,528	4.9	1,432,340	95.1	292,594	-	-	292,594	100	10,753	3.7	281,841	96.3	314,208	5,970	1.9	308,238	98.1	56,303	18.9	249,935	81.1	275,678	67,472	24.5	208,206	75.5	31,472	15.1	176,734	84.9
	-	-	2,607,986	100	186,936	7.0	2,421,050	93.0	626,033	-	-	626,033	100	128,242	20.5	497,791	79.5	605,546	39,638	6.5	565,908	93.5	85,881	15.2	480,027	84.8	587,874	150,477	25.6	437,397	74.4	77,659	17.8	359,738	82.2
	-	-	68,354	100	39,532	57.8	28,822	42.2	55,334	-	-	55,334	100	27,151	49.2	28,183	50.8	38,245	-	-	38,245	100	-	-	38,245	100	19,103	-	-	19,103	100	3,610	18.4	15,493	81.6
	-	-	-	-	-	-	-	-	38,015	-	-	38,015	100	21,544	56.7	16,471	43.3	44,122	-	-	44,122	100	8,297	18.8	35,825	81.2	47,370	5,153	10.9	42,217	89.1	7,758	18.4	34,459	81.6
	-	-	-	-	-	-	-	-	33,980	-	-	33,980	100	-	-	33,980	100	25,585	-	-	25,585	100	8,440	33.0	17,145	67.0	10,532	-	-	10,532	100	7,457	70.8	3,075	29.2
	-	-	371,194	100	-	-	371,194	100	56,894	-	-	56,894	100	-	-	56,894	100	60,916	-	-	60,916	100	-	-	60,916	100	30,878	3,771	12.2	27,107	87.8	-	-	27,107	100
	-	-	26,570	100	-	-	26,570	100	22,349	-	-	22,349	100	11,176	50.0	11,173	50.0	25,920	-	-	25,920	100	8,027	31.0	17,893	69.0	31,977	9,097	28.4	22,880	71.6	3,708	16.2	19,172	83.8
	-	-	80,624	100	-	-	80,624	100	-	-	-	-	-	-	-	-	-	44,224	7,693	17.4	36,531	82.6	8,023	22.0	28,508	78.0	25,008	3,917	15.7	21,091	84.3	4,892	23.2	16,199	76.8
	-	-	180,539	100	-	-	180,539	100	14,766	-	-	14,766	100	-	-	14,766	100	25,379	-	-	25,379	100	-	-	25,379	100	45,580	-	-	45,580	100	3,041	6.7	42,539	93.3
	-	-	-	-	-	-	-	-	18,529	100	-	18,529	100	-	-	-	-	5,165	-	-	5,165	100	-	-	5,165	100	10,770	3,048	28.3	7,722	71.7	4,508	58.4	3,217	41.6
	-	-	727,281	100	39,532	5.4	687,749	94.6	239,867	-	-	239,867	100	78,400	32.7	161,467	67.3	269,556	7,693	2.9	261,863	97.1	32,787	12.5	229,076	87.5	221,218	24,983	11.3	196,235	88.7	34,874	17.8	161,361	82.2
	-	-	648,764	100	-	-	648,764	100	142,696	-	-	142,696	100	26,418	18.5	116,278	81.5	27,976	-	-	27,976	100	-	-	27,976	100	64,557	5,873	9.1	58,684	90.9	5,589	9.5	53,095	90.5
	-	-	328,081	100	26,266	8.0	301,815	92.0	56,350	-	-	56,350	100	16,093	28.6	40,257	71.4	61,218	-	-	61,218	100	10,612	17.3	50,606	82.7	44,097	-	-	44,097	100	12,901	29.3	31,196	70.7
	-	-	3,211,141	100	131,629	4.1	3,079,512	95.9	408,460	-	-	408,460	100	39,676	9.7	368,784	90.3	342,421	-	-	342,421	100	121,048	35.4	221,373	64.6	197,574	-	-	197,574	100	54,984	27.8	142,590	72.2
	-	-	4,187,986	100	157,895	3.8	4,030,091	96.2	608,506	-	-	608,506	100	82,187	13.5	526,319	86.5	431,615	-	-	431,615	100	131,660	30.5	299,955	69.5	306,228	5,873	1.9	300,355	98.1	73,374	24.4	226,981	75.6
81,792	0.2	49,160,545	99.8	4,484,942	9.1	44,675,603	90.9	9,097,194	159,472	1.8	8,937,722	98.2	2,405,411	26.9	6,532,311	73.1	5,897,156	637,136	10.8	5,260,020	89.2	1,412,004	26.8	3,848,016	73.2	4,717,590	1,021,640	21.7	3,695,950	78.3	808,944	21.9	2,887,006	78.1

METHOD OF PROCEDURE AND SOURCE-MATERIALS CONSULTED IN COMPILING DATA AS TO STATUS OF OWNERSHIP OF WATERWORKS IN THE UNITED STATES (Tables I, I-A, and I-B)

PROCEDURE

The figures presented in the foregoing tables (I, I-A, and I-B) are based upon the data contained in Population Bulletin (First Series), United States Summary, Fifteenth Census of the United States, 1930. The cities and urban places listed by states in Tables 12 (Populations of 25,000 and more), 13 (Populations of 10,000 to 25,000), 14 (Populations of 5,000 to 10,000), and 15 (Populations of 2,500 to 5,000), together with the respective population figures, were used in determining the status of ownership of public waterworks; first, as to number of places (Table I-A), and secondly, as to population (Table I-B).

Status of ownership was determined by library research of reliable source-material, listing the results in two categories (Private and Municipal) directly alongside the cities listed in the Census Report above mentioned. This procedure was applied to all population groupings upward from 2,500, no consideration being given to places below this figure.

After exhaustive search of all available known sources, summations were made, by states, for each of the four population groupings, as to: (a) number of cities having privately-owned waterworks; (b) number of cities having municipally-owned waterworks; and (c) number of cities for which ownership could not be determined.

Rearrangement of the results by states was then made to conform to the regional State Divisions given in the Census Summary. In addition to the numerical count in each category, ratios were computed to show, by states, regions and population groups: (1) the percentage of the total cities in each instance for which the ownership remained undetermined; (2) the percentage of the total cities for which the ownership was determined; (3) the percentage of the cities of determined ownership which were found to have privately-owned waterworks; and (4) the percentage of the cities of determined ownership which were found to have municipally-owned waterworks. (See Table I-A for details of this analysis.

A similar approach was used in analyzing the data with reference to ownership on the basis of population. (See Table I-B for details of this analysis.)

In each of these tables, where dual ownership was indicated, one-half credit was given to each category (one-half to private, and one-half to municipal ownership).

The results of the two analyses then were summarized by regional-division totals and population-group totals only. (See Table I for this summary and recapitulation.)

Following is a list of the principal sources consulted:

Sources of Information

Water Supply Statistics of American Municipalities, Second Edition, published in The American City Magazine's "Municipal Index," 1929.

Census of Municipal Water Purification Plants in the United States, 1930-1931, published by the American Waterworks Association.

International City Managers' Association Year Book, 1935.

State and Municipal Compendium, 1935, published by W. B. Dana Company.

Public Works Administration Release No. 1000, Nov. 18, 1934 and Report No. 4, June 19, 1936.

Financial Statistics of Cities, 1931 and 1934, Table 10, U. S. Bureau of Census.

Municipal Index, 1936, p. 119.

Also the following references for segregated areas:

Massachusetts - Annual Report of the Metropolitan Water District, 1934.

California - Los Angeles County Auditor's Report, 1934.

California - State Controller's Report, 1934 and 1935.

California - Magazine "Pacific Municipalities" for October, 1929, p. 421, published by League of California Municipalities and League of Oregon Municipalities (San Francisco).

California - "Water Statistics - Cities, Towns, and Sanitary Districts in California as surveyed in 1930, 1931, and 1932", published by California Bureau of Sanitary Engineering (Sacramento, 1932).

To state the negative, only 23.6 per cent. in number of these cities for which information was obtained were served by privately-owned systems, covering only 13.6 per cent. of the total population of all such cities of determined ownership; and the survey records the ownership of all but 12.7 per cent. of the cities of 2,500 or more population and covers all but 2.8 per cent. of the total population of all of the 3,169 cities in the United States having 2,500 or more inhabitants.

The writer submits that this study furnishes an accurate indication of the status of ownership of waterworks throughout the entire United States and shows that the result predominates heavily on the side of public ownership and that the trend in this direction since the year 1800 has been remarkable. The completeness of the survey is even more apparent with regard to certain of the states and regional divisions (Tables I-A and I-B). For example, data on ownership of the water supplies of all of California's 155 cities of 2,500 or more population were obtainable, showing 74.8 per cent. in number, embracing 91.7 per cent. of the population, to be publicly owned, and 25.2 per cent. in number, covering 8.3 per cent. of the population, to be privately owned. Certain regions and states predominate more heavily in the public ownership column than do others, but the substantial uniformity throughout the country is noteworthy.

The writer respectfully urges that this Honorable Court consult these tables for the detailed statistics regarding the various regions and population groups. It is submitted that such examination will demonstrate the soundness of the writer's belief that the furnishing of water supplies by publicly-owned waterworks is so widespread as to

constitute the performance of usual governmental functions within the present-day meaning of that social concept.

The respondent at bar would have this Court disregard actual facts and social concepts in order to adhere to a rigid method of deductive analysis whereby the public ownership and operation of waterworks would be held not to constitute the performance of usual governmental functions. The chief authority for this methodology is the dictum appearing in *South Carolina v. United States,* 199 U. S. 437, at page 456, where this Court, in holding that the State of South Carolina was subject to the Federal Excise Tax on liquor dealers, says with regard to the exemption of the state's functions and instrumentalities from Federal taxation: "In order to determine to what extent that implication will go we must turn to the condition of things at the time the Constitution was framed."

The writer of this brief respectfully submits that by this remark the Court meant no more than that consideration should be given to conditions existing in 1787 and that the scope of a constitutional limitation might be determined with such consideration in mind. Certainly, in the light of subsequent pronouncements, it would not be seriously disputed, to paraphrase the expression of Mr. Justice Holmes in his memorable dissent in *Lochner v. New York,* 198 U. S. 45, at page 75 (1904), that the Constitution in its implications "does not enact Mr. Herbert Spencer's Social Statics." In *Home Building & Loan Association v. Blaisdell,* 290 U. S. 398 (1933), the

Chief Justice, in speaking for the majority of this Honorable Court, said (pages 442-443):

> "It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is *a constitution* we are expounding' (M'Culloch v. Maryland, 4 Wheat. 316, 407, 4 L. ed. 579, 601)—'a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.' *Id.*, p. 415. When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland, 252 U. S. 416, 433, 64 L. ed. 641, 647, 40 S. Ct. 382, 11 A. L. R. 984, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.'"

See also pages 426-428 and 443-444.

This principle of expanding constitutional concepts was recognized again in *Nebbia v. New York*, 291 U. S. 502,

524-525 (1933). The principle was applied by the Circuit Court of Appeals for the Fifth Circuit to exempt from Federal Income Tax the salary received by the superintendent of a school cafeteria (*Hoskins v. Commissioner of Internal Revenue,* 84 Fed. (2d) 627—1936). It should be applied again in the instant case to exempt the salary of an officer and employee of a municipally-owned waterworks.

The other briefs filed in this cause cite the pertinent cases bearing upon this problem of taxation as decided by this Court and by the various circuit courts of appeal. The writer believes that the question at bar virtually has been settled in favor of the petitioner by the reasoning of this Court in invalidating the Municipal Bankruptcy Act (*Ashton v. Cameron County Water Improvement District No. One,* 298 U. S. 513 (1935), especially at pages 527-530). Even the dissenting opinion recognizes the governmental nature of the ownership and operation of the waterworks there involved (page 538). This case has been analyzed so fully in the other briefs that further discussion will not be made here.

To the writer it is not apparent that there is any basis of distinction whereby the cited decision can be upheld and yet a ruling be made in the case at bar that the ownership and operation of waterworks by a municipality of the state constitutes a private, nongovernmental function subject to Federal taxation.

It is earnestly submitted that the course of expanding social concepts and the course of developing judicial precedents alike require that petitioner's salary be held to be exempt from Federal taxation.

II.

The Activities of The Metropolitan Water District of Southern California Are Governmental in Character Within the Exemption From Federal Taxation Laid Down by the Adjudicated Cases.

The Metropolitan Water District of Southern California was incorporated December 6, 1928, under and pursuant to the provisions of the Metropolitan Water District Act of the State of California, Statutes of 1927, page 694, Deering's General Laws, Act 9129. This act was amended by Stats. 1929, page 1613, by Stats. 1931, page 814, and by Stats. 1933, page 1289.

The occasion for the incorporation of the District arose from the necessity for importing an additional water supply to the metropolitan area of Southern California. The area involved is semiarid and the annual water supply locally available is less than the annual consumption. The reserve supply in underground basins is being constantly drawn down. The situation required that a vast region save itself by governmental action by bringing in water from a great distance in such quantities as to guarantee adequate supplies for the needs of the cities and municipalities of this region in their governmental and corporate capacities, as well as for the needs of their inhabitants. Without additional supplies, the cities of Southern California would be incapable of growth and would be subject to regression because of the constant depletion of existing supplies, resulting in insufficient water to maintain the present population and industries.

Without the aid of governmental powers, particularly the taxing power, it would have been impossible to pre-

serve the present development or make provision for future growth. The cost of the project (estimated at two hundred and twenty million dollars), the long construction period (five to six years), the fact that revenues from water sales will not pay operating expenses for many years (estimated twenty years), and the fact that the works will never be profitable as a business venture but find their justification and necessity in the general welfare of the community, all remove the project from the field of private enterprise. Without the taxing power the problem presented by the great cost, the long construction period, and the longer development or load building period, could not be met.

This District is composed of the corporate area of thirteen cities in Southern California, having an aggregate population, according to the 1930 census, of 1,665,833. Ten of these cities are located in the County of Los Angeles, namely, Beverly Hills, Burbank, Compton, Glendale, Long Beach, Los Angeles, Pasadena, San Marino, Santa Monica and Torrance; and three of the cities are located in the County of Orange, namely, Anaheim, Fullerton and Santa Ana.

To further its purpose, the District entered into certain contracts with the United States of America, acting by and through the Secretary of the Interior, namely, a water contract dated April 24, 1930, and a supplemental water contract dated September 28, 1931, by which the United States agrees to furnish the District 1,100,000 acre feet of water per annum, stored behind Boulder Dam, upon the conditions and terms stated in the contracts; and a contract for power for pumping water into and in the aqueduct, dated April 26, 1930, and a supplemental contract for such power, dated May 31, 1930.

On September 29, 1931, the electors of the District authorized a bond issue in the sum of $220,000,000 for the purpose of constructing an aqueduct and necessary appurtenances and facilities for bringing this water from the Colorado River to the District for distribution to the cities, whose areas are included in the District. The population of the District comprises 29 per centum of the entire population of the State of California according to the 1930 census.

As an additional aid to its proper functioning, the District entered into a further contract for the construction of Parker Dam by the Reclamation Bureau, this contract being dated February 10, 1933. In all of these contracts, the District's character as a governmental agency of the State of California, performing usual governmental functions, is recognized.

This brief recapitulation of the factual nature of the District's organization and activities is so commonly known as to be within the judicial knowledge of this Court. (*Arizona v. California*, 283 U. S. 423, 452-454—1930.)

The legal status of The Metropolitan Water District of Southern California as a governmental unit performing usual governmental functions is disclosed by the provisions of the Metropolitan Water District Act and the decisions of the Supreme Court of California, to all of which brief reference now will be made. Unless otherwise specified, section references will be to the provisions of the Metropolitan Water District Act.

The District is organized "for the purpose of developing, storing and distributing water for domestic purposes" and is declared by the legislature to be "a separate and independent political corporate entity." (Sec. 3.) The

District has perpetual succession, and may sue and be sued; may adopt a corporate seal and alter it; may take by grant, purchase, bequest, devise or lease, and hold, lease, sell, or otherwise dispose of, any and all real and personal property necessary or convenient to the full exercise of its powers. (Sec. 5, subds. 1 to 4.) The District also possesses the power of eminent domain to be exercised in the manner provided by law, respecting municipal corporations. (Sec. 5, subd. 5.) The District is authorized, subject to certain limitations, "to borrow money and incur indebtedness and to issue bonds or other evidence of such indebtedness" and "to levy and collect taxes for the purposes of carrying on the operations and paying the obligations of the District", such taxing power being without limitation as to rate or amount so far as meeting both principal and interest requirements of the bonded indebtedness but being subject to a limitation of five cents on each one hundred dollars assessed valuation for all other purposes. (Sec. 5, subds. 7 and 8.) The District is given the power "to join with one or more other public corporations for the purpose of carrying out any of its powers". (Sec. 5, subd. 9.)

The procedure for incurring bonded indebtedness and for issuing, selling and refunding such bonds is set out with great particularity in Section 7 and also in subdivision 12 of Section 5. This procedure is modeled on the act providing for the issuance of general obligations of cities and municipal corporations incurred for admittedly governmental purposes. (Stats. 1901, page 27, Deering's General Laws, Act 5178, as amended.) This procedure has been followed by The Metropolitan Water District of Southern California, which now has bonds issued and

outstanding in the aggregate amount of $105,184,000, all but $1,500,000 of which were purchased by the Reconstruction Finance Corporation, and are still held by it. The $1,500,000 of bonds were purchased by the Public Works Administration.

All bonds issued by the District are general tax obligations, to meet the principal and interest requirements of which the Board of Directors is under a statutory duty to levy sufficient taxes upon all taxable property, both real and personal, within the District. (Sec. 5, subd. 8; Sec. 7, subd. j.) The procedure for levying such taxes, together with any taxes levied for general District purposes, is prescribed. (Sec. 8.)

The powers of the District are vested in a Board of Directors consisting of representatives from each municipality, the area of which lies within the District, the representatives being appointed by the chief executive officers with the consent of the governing bodies of the respective municipalities. The Board of Directors is given power to provide for the holding of meetings, to pass ordinances, resolutions and orders, all ordinances, except those of specified categories, to be subject to referendum by the electors of the District. The Board further is authorized to prescribe by ordinance a system of business administration, and to create necessary offices, including those of controller and treasurer, and to prescribe by ordinance a system of civil service. (Sec. 6, especially subds. 1, 2, 4 and 5.) Every director is subject to recall by the voters of his municipality. (Sec. 12.) The Board is authorized to provide by ordinance for all matters and things necessary for the proper administration of the District's affairs, which are not provided for in the Act. (Sec. 13.)

Upon this framework of municipal organization and procedure is erected the capstone of governmental functioning in regard to the acquisition, preservation and protection of adequate municipal water supplies for the performance of usual governmental activities.

Section 5, subdivision 10, provides that the District shall have power:

> "To acquire water and water rights within or without the State; to develop, store and transport water; to provide, sell and deliver water at wholesale for municipal and domestic uses and purposes; to provide, sell and deliver surplus water of the district not needed or required by member cities for domestic or municipal uses therein, for beneficial purposes, but giving preference to uses within the district; provided, that the supplying of such surplus water shall, in every case, be subject to the paramount right of the district to discontinue the same, in whole or in part, and to take and hold, or to provide, sell and deliver, such water for domestic or municipal uses within the district, upon one year's written notice to the purchaser or user of such surplus water, such notice to be given by the board of directors of the district whenever it shall be determined and declared by resolution adopted by said board of directors by a two-thirds vote thereof that such water is needed or required by member cities of the district for domestic or municipal uses therein; to fix the rates therefor, and to acquire, construct, operate and maintain any and all works, facilities, improvements and property necessary or convenient therefor."

Section 5½ establishes the proportionate right of cities whose corporate areas compose the District by the following provisions:

"Each city, the area of which shall be a part of any district incorporated hereunder, shall have a preferential right to purchase from the district for distribution by such city, or any public utility therein empowered by said city for the purpose, for domestic and municipal uses within such city a portion of the water served by the district which shall, from time to time, bear the same ratio to all of the water supply of the district as the total accumulation of amounts paid by such city to the district on tax assessments and otherwise, excepting purchase of water, toward the capital cost and operating expense of the district's works shall bear to the total payments received by the district on account of tax assessments and otherwise, excepting purchase of water, toward such capital cost and operating expense."

It is to be noted that the District is to be a wholesaler of water. It will furnish water to its component cities. It will not sell at retail to commercial or domestic consumers of water.

The supplying of water by a municipality or other state agency for the following purposes has been held to be the performance of an usual governmental function, and clearly would be exempt from Federal taxation:

1. PUBLIC HEALTH

Columbus v. Mercantile Trust & D. Co., 218 U. S. 645, 658, 661 (1910);

Tillman v. District of Columbia, 29 Fed. (2d) 442, 443 (Court of Appeals of District of Columbia, 1928).

2. Fire Protection

Columbus v. Mercantile Trust & D. Co., supra;

German Alliance Insurance Co. v. Home Water Supply Co., 226 U. S. 220, 227-228 (1912);

American-La France Fire Eng. Co. v. Riordan, 6 Fed. (2d) 964, 966 (Circuit Court of Appeals, 2d Circuit, 1925).

3. Sewage Disposal

New Orleans Gaslight Co. v. Drainage Commission of New Orleans, 197 U. S. 453, 460, 461 (1904).

4. Street Cleaning and Sprinkling

Harris v. District of Columbia, 256 U. S. 650, 652 (1920).

5. Public Showers and Baths

Tillman v. District of Columbia, supra.

6. Public Parks

Commissioner of Internal Revenue v. Sherman, 69 Fed. (2d) 755, 759 (Circuit Court of Appeals, 1st Circuit. 1934);

Commissioner of Internal Revenue v. Lamb, 82 Fed. (2d) 733 (Circuit Court of Appeals, 9th Circuit, 1936).

7. IRRIGATION IN THE ARID LAND STATES OF THE WEST

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U. S. 142, 165 (1934);

Ashton v. Cameron County Water Improvement District No. One, supra (298 U. S. at p. 524).

8. PUBLIC HOSPITALS

Mallory v. White, 8 Fed. Supp. 989 (District Court, D. of Mass., 1934).

From the outline of the purposes and powers of The Metropolitan Water District of Southern California set forth in the foregoing pages, it is apparent that this district exists and functions as a protective mechanism to insure adequate and safe supplies of water to its component cities, so that they will be enabled to perform their admittedly governmental functions of furthering or furnishing the public health, fire protection, sewage disposal, street cleaning and sprinkling, public showers and baths, public parks, and public hospitalization. Even the furnishing of water for irrigation in the semiarid coastal plain of Southern California, which function is performed by some of the district's cities to an incidental and subordinate extent, would invoke the governmental powers of such cities.

The Supreme Court of California has considered the legal status of the Metropolitan Water District and the nature of its functions on several occasions and has determined conclusively, so far as State law is concerned, that such district is a municipal corporation, possessing and exercising usual governmental powers for the furtherance

of a state object and governmental purpose. (*City of Pasadena v. Chamberlain*, 204 Cal. 653, 660, 662-664—1928; *Wheatley v. Superior Court*, 207 Cal. 722, 726—1929; *Golden Gate Bridge & Highway District v. Felt*, 214 Cal. 308, 321—1931; *Metropolitan Water District v. Whitsett*, 215 Cal. 400, 406-407—1932; *In re Metropolitan Water District*, 215 Cal. 582, 586—1932; *Metropolitan Water District v. Superior Court*, 2 Cal. (2d) 4, 6-7—1934.)

A bridge and highway district of the State of California has been held to be engaged in the exercise of usual governmental functions within the exemption from Federal income taxation (*Commissioner of Internal Revenue v. Harlan*, 80 Fed. (2d) 660—Circuit Court of Appeals, 9th Circuit, 1935), and the California cases cited hold that the Metropolitan Water District is of similar character to a bridge and highway district and is similarly engaged in performing usual governmental functions.

The fact that a metropolitan water district might be held under California law to be subject to tort liability arising from its operations (see *Morrison v. Smith Bros., Inc.*, 211 Cal. 36, 44—1930, establishing such liability as to a municipal utility district engaged in furnishing public water supplies) does not militate against the governmental character of the district's functions when considering the tax problem. The supposed distinction between governmental functions in the performance of which no tort liability arises and the proprietary functions where tort liability may arise has been used by the courts in their desire to achieve substantial justice when citizens were injured by various instrumentalities of the state and its political subdivisions. This distinction is losing its

significance and is of no validity in the realm of constitutional limitations upon the taxing powers of the states and of the Federal government with respect to the instrumentalities of each other. (*City of Pasadena v. Chamberlain, supra,* at pages 662, 664; *Trenton v. New Jersey,* 262 U. S. 182, 191-192—1922.)

The rationale of the tax cases decided by this Court establishes the exemption of the Metropolitan Water District from Federal taxation. In *Ohio v. Helvering,* 292 U. S. 360 (1933), in holding that the agencies of the State of Ohio for selling liquors were subject to Federal Excise Tax, there was stated the principle of dual sovereignty applicable to matters of taxation, at pages 368, 369:

> "* * * But, by the very terms of the rule, the immunity of the states from federal taxation is limited to those agencies which are of a governmental character. Whenever a state engages in a business of a private nature it exercises nongovernmental functions, and the business, though conducted by the state, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress. * * *
>
> * * * * * * * *
>
> "* * * If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto,* and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned."

Again, in *Helvering v. Powers, supra,* wherein the salaries received by the trustees from the Boston Elevated Railway Company were held taxable, this Court said (293 U. S. at p. 225):

> "* * * And one of these limitations is that the State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend."

See also:

> *Ashton v. Cameron County Water Improvement District No. One, supra,* at pages 528-530 (298 U. S.).

The Metropolitan Water District of Southern California is not "entering the market place seeking customers," nor is it engaged in an enterprise for profit. The raising of revenues from water rates and the incidental sale directly by the District of surplus water not needed or required by its cities do not destroy the governmental character of the District's functions and the nonprofit nature of its activities. (*Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 335-338—1935; *New York ex rel. Rogers v. Graves,* 81 L. ed. Adv. Ops. 202, 206—decided Jan. 4, 1937.)

The Metropolitan Water District of Southern California is a municipal corporation and instrumentality of the State of California, existing and functioning for the purpose of protecting the communities included in such

District in the maintenance and further acquisition of adequate and pure water supplies necessary to such component communities in order that those cities may perform the recognized governmental functions relating to the public health, fire protection, sewage disposal, street cleaning and sprinkling, public showers and baths, public parks, public hospitals, and irrigation of arid lands. In so doing the District is itself performing a governmental function which not only is usually performed by the sovereignty, but is impossible of performance by private enterprise. (*Ashwander v. Tennessee Valley Authority, supra,* at pages 327-328; *New York ex rel. Rogers v. Graves, supra,* at pages 205-206; *New Jersey v. New York,* 283 U. S. 336, 342—1930; *Arizona v. California, supra* (283 U. S. 423—1930); *Arizona v. California,* 292 U. S. 341—1933; *United States v. Arizona,* 295 U. S. 174—1934; *Rivers and Harbors Act of August 30, 1935,* 74th Congress, 1st Session, Chap. 831, Sec. 2; *Arizona v. California,* 298 U. S. 558—1935.)

The writer has stated his reasons for the belief that a municipality or other state agency, owning and operating its waterworks for supplying itself with water for municipal uses and its inhabitants with water for domestic consumption, is engaged in the performance of "usual governmental functions" within the constitutional immunity from Federal taxation. However, the writer has deemed it his duty to point out to this Honorable Court the distinctions between such activities and those of The Metropolitan Water District of Southern California.

Even if the retailing of water to private consumers be held to involve the "entering of the market place to seek customers" to such an extent as to remove the activity from the constitutional immunity of governmental functions, it is earnestly submitted that the furnishing of water by the District to its component cities by means of legal machinery which can be invoked only by a governmental agency of the state renders such District exempt from Federal taxation. To hold otherwise would jeopardize the welfare of nearly one-third the population of the State of California and would endanger property values approximating one-third of the assessed valuation of the entire state. Complex relationships have been established with the Federal government itself and the District is an important factor in the Boulder Dam development undertaken by the United States.

What has been said of the Metropolitan Water District may be true to a greater or less degree as to all municipal service of water but whatever be the decision as to the taxability of the income received by petitioner at bar from the City of New York, the writer respectfully urges that the Court bear in mind the governmental character of The Metropolitan Water District of Southern California, so that the decision in the within cause may not imperil the great water development in which the cited District is a leading actor.

III.

Unless the Court Be Prepared to Rule That the United States May Tax the Obligations, Property and Income of Publicly-Owned Waterworks of the Various States, and That the States May Tax the Obligations, Property and Income of Publicly-Owned Waterworks of the United States, the Salaries Paid by Such Publicly-Owned Waterworks to Their Officers and Employees Must Be Held to Be Exempt From Taxation by the Federal Government and by the Various States, Respectively.

Obligations issued by the states or their municipal corporations, or other state agencies, to evidence moneys borrowed for governmental purposes, are exempt from Federal taxation (*Pollock v. Farmers Loan & T. Co.*, 157 U. S. 429, 584-586, 601, 652, 653—1894), and the same rule obtains with regard to obligations issued by the United States, or its instrumentalities (*Weston v. Charleston*, 2 Pet. 449, 468—1829; *Farmers & M. Savings Bank v. Minnesota*, 232 U. S. 516, 525—1913). The property of such instrumentalities is within the same exemption (*Gillespie v. Oklahoma*, 257 U. S. 501, 505—1921), and no excise tax can be imposed directly based thereon (*Indian Motorcycle Co. v. United States*, 283 U. S. 570, 575-579—1930). The income of any such instrumentality has the same immunity for the same reasons (authorities cited).

The exemption from state taxation of salary received by an officer or employee of the United States, or some

agency or instrumentality thereof (*Dobbins v. Erie County*, 16 Pet. 435, 448-449—1842), and the exemption from Federal taxation of the salary of an officer of a state or municipality or agency thereof (*Collector v. Day*, 11 Wall. 113, 124—1870), are grounded upon the selfsame principle as the immunity of obligations and property and income of such instrumentalities from taxation by the other "dual sovereignty." If the salaries of the officers or employees be taxable, the obligations, property and income of the public instrumentality itself would be taxable, so far as constitutional limitations are concerned (*New York ex rel. Rogers v. Graves, supra*, at page 206).

Interest upon the obligations of a state, or any political subdivision thereof, is currently subject to a statutory exemption expressed in Sec. 22, subd. (b) (4) of the Revenue Act of 1936. The statutory exemption of income of states, municipalities and other political subdivisions is presently expressed in Sec. 22, subd. (b) (8) and Sec. 116, subd. (d) of the Revenue Act of 1936.

Unless such interest and income be protected by constitutional limitations, Congress might impose a tax at any time and thereby impair, if not actually destroy, the governmental functions of the taxed instrumentalities of the states.

For these reasons, the writer urges upon the Court the significance of the decision regarding the taxability of the income of officers and employees of such instrumentalities. If they be taxed, the instrumentalities themselves may be taxed. It is hoped that the foregoing pages of this brief have made apparent the extreme seriousness of such a result. Hence it is respectfully submitted that this Court should not thus imperil the public welfare—nay, the very

existence—of thousands of communities throughout the United States which depend, and must continue to depend, upon publicly-owned waterworks for their protection and salvation.

The writer earnestly submits that proper application of the principles enunciated by the cases herein cited will require exemption from Federal Income Tax of the salaries received by petitioner at bar, and by all other public officers and employees similarly situated.

Conclusion.

It is respectfully submitted that the salary of petitioner involved in the case at bar should be held to be exempt from Federal Income Tax.

Moreover, the writer earnestly hopes that the foregoing brief has demonstrated the validity of his conviction that whatever may be the decision respecting the waterworks system of the City of New York, the activities of The Metropolitan Water District of Southern California are governmental in character and, in proper case, should be ruled immune from interference by imposition of Federal taxes, whether upon the obligations, property or income of the District itself, or upon the salaries of its officers and employees.

Respectfully submitted,

JAMES H. HOWARD,

Counsel for Frank E. Weymouth, General Manager and Chief Engineer of The Metropolitan Water District of Southern California,

Amicus Curiae.

CHARLES C. COOPER, JR.,

Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 451.—October Term, 1936.

William Whitlock Brush, Petitioner, *vs.* Commissioner of Internal Revenue. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 15, 1937.]

Mr. Justice Sutherland delivered the opinion of the Court.

The question brought here for determination is whether the salary of petitioner as Chief Engineer of the Bureau of Water Supply of the City of New York is a part of his taxable income for the purposes of the federal income-tax law. The answer depends upon whether the water system of the city was created and is conducted in the exercise of the city's governmental functions. If so, its operations are immune from federal taxation and, as a necessary corollary, "fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune." *New York ex rel. Rogers* v. *Graves*, —— U. S. —, — (January 4, 1937).

Petitioner holds his office as Chief Engineer by statutory authority, with a fixed annual salary of $14,000. He exercises supervision over the engineering details connected with the supplying of water for public purposes and for consumption by the inhabitants of the city; supervises the protection of the water supply from pollution; and generally exercises control over the operation of the water system, its personnel, expenditure of money and other matters relating thereto.

In the early history of the city, water was furnished by private companies; but a century or more ago, the city itself began to take over the development and distribution. In 1831, the Board of Aldermen declared its dissatisfaction with the private control, and resolved that the powers then vested in private hands should be repealed by the legislature and vested exclusively in the corporation of the City of New York. This, in effect, was initiated in 1833

(L. 1833, ch. 36); and, soon thereafter, the city constructed municipal water works, and, with slight exceptions, private control and operation ceased. The sources of water supply furnished by such companies as remain is approaching exhaustion, and the water furnished is of a quality inferior to that supplied by the municipality. From 1833 to the present time, additions to the water supply and system have been steadily made until the cost has mounted to more than $500,000,000; and it is estimated that additional expenditures of a quarter of a billion dollars will be necessary. The cost of bringing water from the Catskills alone amounted to approximately $200,000,000. The municipal outstanding bonded indebtedness incurred for supplying the city with water amounts to an enormous sum. More than half the entire population of the state is found within the municipal boundaries. The action of the city from the beginning has been taken under legislative authority.

The Commissioner of Internal Revenue having assessed a deficiency tax against petitioner in respect of his salary, petitioner sought a redetermination at the hands of the Board of Tax Appeals. That board sustained the commissioner and decreed a deficiency against petitioner of $256.27 for the year 1931. Upon review, the court below affirmed the decree of the board. 85 F. (2d) 32. While the sum involved is small, we granted the writ of certiorari because of the obvious importance of the question involved.

The phrase "governmental functions", as it here is used, has been qualified by this court in a variety of ways. Thus, in *South Carolina* v. *United States*, 199 U. S. 437, 461, it was suggested that the exemption of state agencies and instrumentalities from federal taxation was limited to those which were of a *strictly* governmental character, and did not extend to those used by the state in carrying on an ordinary private business. In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172, the immunity from taxation was related to the *essential* governmental functions of the state. In *Helvering* v. *Powers*, 293 U. S. 214, 225, we said that the state "cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from *usual* governmental functions and to which, by reason of their nature, the federal taxing power would normally extend." And immunity is not established because the state has the power to engage in the business for what the state conceives to be the public benefit. *Idem.* In

United States v. *California*, 297 U. S. 175, 185, the suggested limit of the federal taxing power was in respect of activities in which the states have *traditionally* engaged.

In the present case, upon the one side, stress is put upon the adjective "essential", as used in the *Flint* v. *Stone Tracy* case, while, on the other side, it is contended that this qualifying adjective must be put aside in favor of what is thought to be the greater reach of the word "usual", as employed in the *Powers* case. But these differences in phraseology, and the others just referred to, must not be too literally contradistinguished. In neither of the cases cited, was the adjective used as an exclusive or rigid delimitation. For present purposes, however, we shall inquire whether the activity here in question constitutes an essential governmental function within the proper meaning of that term; and in that view decide the case.

There probably is no topic of the law in respect of which the decisions of the state courts are in greater conflict and confusion than that which deals with the differentiation between the governmental and corporate powers of municipal corporations. This condition of conflict and confusion is confined in the main to decisions relating to liability in tort for the negligence of officers and agents of the municipality. In that field, no definite rule can be extracted from the decisions.[1] It is true that in most of the state courts, including those in the State of New York, it is held that the operation of water works falls within the category of corporate activities; and the city's liability is affirmed in tort actions arising from negligence in such operation. But the rule in respect of such cases, as we pointed out in *Trenton* v. *New Jersey*, 262 U. S. 182, 192, has been "applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations"; and the rule is hopelessly indefinite, probably for that very reason.

[1] This is brought out in a careful and detailed review by Professor Borchard in that portion of his general discussion of "Government Liability in Tort" dealing with municipal corporations, to be found in (1924-5) 34 Yale L. J. 129-143, 229-258, in the course of which he says (p. 129): "Disagreement among the courts as to many customary municipal acts and functions may almost be said to be more common than agreement and the elaboration of the varying justifications for their classification is even less satisfying to any demand for principle in the law. Indeed, so hopeless did the effort of the courts to make an appropriate classification of functions appear to the Supreme Court of South Carolina that they determined to abandon the distinction between governmental and corporate acts."

This is not, however, an action for personal injuries sounding in tort, but a proceeding which seeks in effect to determine whether immunity from federal taxation, in respect of the activity in question, attaches in favor of a state-created municipality—an objective so different in character from that sought in a tort action as to suggest caution in applying as the guide to a decision of the former a local rule of law judicially adopted in order to avoid supposed injustices which would otherwise result in the latter. We have held, for example, that the sale of motorcycles to a municipal corporation for use in its police service is not subject to federal taxation, because the maintenance of such a service is a governmental function. *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 579. And while it is true that the weight of authority in tort actions accords with that view, there are state decisions which affirm the liability of a municipality for personal injury resulting from the negligence of its police officials under the circumstances presented in the respective cases dealt with.[2] Nevertheless, our decision in the *Indian Motocycle* case did not rest in the slightest degree upon a consideration of the state rule in respect of tort actions, but upon a broad consideration of the implied constitutional immunity arising from the dual character of our national and state governments.

The rule in respect of municipal liability in tort is a local matter; and whether it shall be strict or liberal or denied altogether is for the state which created the municipality alone to decide (*Detroit* v. *Osborne,* 135 U. S. 492, 497-498)—provided, of course, the federal Constitution be not infringed. But a federal tax in respect of the activities of a state or a state agency is an imposition by one government upon the activities of another, and must accord with the implied federal requirement that state and local governmental functions be not burdened thereby. So long as our present dual form of government endures, the states, it must never be forgotten, "are as independent of the general government as that government within its sphere is independent of the States." *The Collector* v. *Day,* 11 Wall. 113, 124. And, as it was said in *Texas* v. *White,* 7 Wall. 700, 725, and often has been repeated—"the preservation of

[2] See Herron *v.* Pittsburg, 204 Pa. St. 509, 513; Jones *v.* City of Sioux City, 185 Iowa 1178, 1185; Twist *v.* City of Rochester, 55 N. Y. Supp. 850. Compare Kunz *v.* City of Troy, 104 N. Y. 344, 348, with Altvater *v.* Mayor &c. of Balto., 31 Md. 462.

the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." The unimpaired existence of both governments is equally essential. It is to that high end that this court has recognized the rule, which rests upon necessary implication, that neither may tax the governmental means and instrumentalities of the other. *The Collector* v. *Day, supra,* p. 127. In the light of these considerations, it follows that the question here presented is not controlled by local law but is a question of national scope to be resolved in harmony with implied constitutional principles of general application. Compare *Workman* v. *New York City, Mayor &c.,* 179 U. S. 552, 557. This indicated dissimilarity constitutes a distinction which is fundamental; and we put aside the state decisions in tort actions as inapposite. Compare *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 433 *et seq.*

We thus come to a situation, which the courts have frequently been called upon to meet, where the issue cannot be decided in accordance with an established formula, but where points along the line "are fixed by decisions that this or that concrete case falls on the nearer or farther side." *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 355. We are, of course, quite able to say that certain functions exercised by a city are clearly governmental—that is, lie upon the nearer side of the line—while others are just as clearly private or corporate in character, and lie upon the farther side. But between these two opposite classes, there is a zone of debatable ground within which the cases must be put upon one side or the other of the line by what this court has called the gradual process of historical and judicial "inclusion and exclusion." *Continental Bank* v. *Rock Island Ry.,* 294 U. S. 648, 670, and cases cited.

We think, therefore, that it will be wise to confine, as strictly as possible, the present inquiry to the necessities of the immediate issue here involved, and not, by an attempt to formulate any general test, risk embarrassing the decision of cases in respect of municipal activities of a different kind which may arise in the future. Cf. *Euclid* v. *Ambler Co.,* 272 U. S. 365, 397; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523. In the case last named we had occasion to point out the difficulty, albeit the necessity, as cases arise within the doubtful zone, of drawing the line which separates those

activities which have some relation to government but are subject to taxation from those which are immune. "Experience has shown", we said, "that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other."

The public interest in the conservation and distribution of water for a great variety of purposes—ranging from ordinary agricultural, domestic and sanitary uses, to the preservation of health and of life itself—is obvious and well settled. For the modern city, such conservation and distribution of water in sufficient quantity and in a state of purity is as vital as air. And this vital necessity becomes more and more apparent and pressing as cities increase in population and density of population. It has found, so far, its culminating point in the vast and supreme needs of the City of New York.

One of the most striking illustrations of the public interest in the use of water and the governmental power to deal with it is shown in legislation and judicial pronouncement with respect to the arid-land states of the far west. In some of them, the state constitution asserts public ownership of all unappropriated non-navigable waters. In Utah, while it was still a territory, a statute conferred the right upon individual land owners to condemn rights-of-way across the lands of others in order to convey water to the former for irrigation purposes, and declared that such condemnation was for a "public use." This court upheld the statute. *Clark* v. *Nash*, 198 U. S. 361. We said that what is a public use may depend upon the facts surrounding the subject; pointed out the vital need of water for irrigation in the arid-land states, a need which did not exist in the states of the east and where, consequently, a different rule obtained; and held that the court must recognize the difference of climate and soil which rendered necessary differing laws in the two groups of states.

Many years ago, Congress, recognizing this difference, passed the Desert Land Act (c. 107, 19 Stat. 377), by which, among other things, the waters upon the public domain in the arid-land states and territories were dedicated to the use of the public for irrigation and other purposes. Following this act, if not before, all non-navigable waters then on and belonging to that part of the national domain became *publici juris*, subject to the plenary control of the arid-land states and territories with the right to determine to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. *Power Co.* v. *Cement Co.*, 295 U. S. 142, 155 *et seq.* And in *Kansas* v. *Colorado*, 206 U. S. 46, 94, this court entertained and decided a controversy between two states involving the right of private appropriators in Colorado to divert waters for the irrigation of lands in that state from a river naturally and customarily flowing into the State of Kansas. It was held (p. 99) that such a controversy rises "above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint." Cf. *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 355; *New Orleans Gas Co.* v. *Drainage Comm.*, 197 U. S. 453, 460; *Houck* v. *Little River District*, 239 U. S. 254, 261.

In *New Orleans* v. *Morris*, 105 U. S. 600, 602, the city had conveyed its water works to a corporation formed for the purpose of maintaining and enlarging them. The city received as consideration shares of stock, which a state statute declared should not be liable to seizure for the debts of the city. It was held the statute did not impair the obligation of any contract, since the shares represented the city's ownership in the water works which had, before the enactment of the statute, been exempted from seizure and sale. This ruling was put upon the ground that the water works were of such public utility and necessity that they were held in trust for the use of the citizens the same as public parks and public buildings.

While these cases do not decide, they plainly suggest, that municipal water works created and operated in order to supply the needs of a city and its inhabitants are public works and their operation essentially governmental in character. Other decisions of this court, however, more directly support that conclusion.

We recently have held that the bankruptcy statutes could not be extended to municipalities or other political subdivisions of a

state. *Ashton* v. *Cameron County Dist.*, 298 U. S. 513. The respondent there was a water-improvement district organized by law to furnish water for irrigation and domestic uses. We said (pp. 527-528) that respondent was a political subdivision of the state "created for the local exercise of her sovereign powers, . . . Its fiscal affairs are those of the State, not subject to control or interference by the National Government, unless the right so to do is definitely accorded by the Federal Constitution." In support of that holding, former decisions of this court with respect to the immunity of states and municipalities from federal taxation were relied upon as apposite. The question whether the district exercised governmental or merely corporate functions was distinctly in issue. The petition in bankruptcy alleged that the district was created with power to perform "the proprietary and/or corporate function of furnishing water for irrigation and domestic uses . . ." The district judge held that the district was created for the local exercise of state sovereign powers; that it was exercising "a governmental function"; that its property was public property; that it was not carrying on private business, but public business. That court, having denied the petition for want of jurisdiction, the district submitted a motion for a new trial in which it assigned, among other things, that the court erred in holding that petitioner was created for the purpose of performing governmental functions, "for the reason that the Courts of Texas, as well as the other Courts in the Nation, have uniformly held that the furnishing of water for irrigation was purely a proprietary function . . ." Substantially the same thing was repeated in other assignments of error. In the petition for rehearing in this court, the district challenged our determination that respondent was a political subdivision of the state "created for the local exercise of her sovereign powers," and asserted to the contrary that the facts would demonstrate that "respondent is a corporation organized for essentially proprietary purposes." It is not open to dispute that the statements quoted from our opinion in the *Ashton* case were made after due consideration, and the case itself decided and the rehearing denied in the light of the issue thus definitely presented. Compare *Bingham* v. *United States*, 296 U. S. 211, 218-219.

"No higher police duty rests upon municipal authority", this court said in *Columbus* v. *Mercantile Trust Co.*, 218 U. S. 645, 658,

"than that of furnishing an ample supply of pure and wholesome water for public and domestic uses. The preservation of the health of the community is best obtained by the discharge of this duty, to say nothing of the preservation of property from fire, so constant an attendant upon crowded conditions of municipal life."

In *Dunbar* v. *City of New York*, 251 U. S. 516, we sustained a charter provision giving a lien for water charges upon a building in which the water had been used, although the charges had been incurred by tenants and not by the owner, saying—"And as a supply of water is necessary it is only an ordinary and legal exertion of government to provide means for its compulsory compensation."

In *German Alliance Ins. Co.* v. *Home Water Co.*, 226 U. S. 220, the City of Spartanburg had entered into a contract with the respondent by which the latter was empowered to supply the city and its inhabitants with water suitable for fire, sanitary and domestic purposes. The petitioner had issued a policy of fire insurance upon certain property, which was destroyed by fire. It paid the amount of the loss, and took an assignment from the insured of all claims and demands against any person arising from or connected with the loss. It brought suit against the respondent on the ground that the fire could easily have been extinguished if respondent had complied with its contract. This court held that the action was not maintainable for reasons which appear in the opinion. The city, it was said, was under no *legal* obligation to furnish water; and it did not subject itself to a new or greater liability because it voluntarily undertook to do so (pp. 227-228). "It acted in a governmental capacity, and was no more responsible for failure in that respect than it would have been for failure to furnish adequate police protection."

We conclude that the acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental functions, and this conclusion is fortified by a consideration of the public uses to which the water is put. Without such a supply, public schools, public sewers so necessary to preserve health, fire departments, street sprinkling and cleaning, public buildings, parks, playgrounds, and public baths, could not exist. And this is equivalent, in a very real sense, to saying that the city itself would then disappear. More than one-fourth of the water

furnished by the city of New York, we are told by the record, is utilized for these public purposes. Certainly, the maintenance of public schools, a fire department, a system of sewers, parks and public buildings, to say nothing of other public facilities and uses, calls for the exercise of governmental functions. And so far as these are concerned, the water supply is a necessary auxiliary, and, therefore, partakes of their nature. *New York ex rel. Rogers* v. *Graves,* — U. S. —, — (January 4, 1937). Moreover, the health and comfort of the city's population of 7,000,000 souls, and in some degree their very existence, are dependent upon an adequate supply of pure and wholesome water. It may be, as it is suggested, that private corporations would be able and willing to undertake to provide a supply of water for all purposes; but if the State and City of New York be of opinion, as they evidently are, that the service should not be entrusted to private hands but should be rendered by the city itself as an appropriate means of discharging its duty to protect the health, safety and lives of its inhabitants, we do not doubt that it may do so in the exercise of its essential governmental functions.

We find nothing that detracts from this view in the fact that in former times the business of furnishing water to urban communities, including New York, in fact was left largely, or even entirely, to private enterprise. The tendency for many years has been in the opposite direction, until now in nearly all the larger cities of the country the duty has been assumed by the municipal authorities. Governmental functions are not to be regarded as non-existent because they are held in abeyance, or because they lie dormant, for a time. If they be by their nature governmental, they are none the less so because the use of them has had a recent beginning.

The principle finds illustration in our decision in *Shoemaker* v. *United States,* 147 U. S. 282, 297, where it was held that land taken by an exercise of the power of eminent domain for the establishment of Rock Creek Park in the District of Columbia was taken for a public use, and that the amount required to be paid was validly assessed upon lands in the district specially benefited thereby. At the beginning of the opinion in that case, this court said: "In the memory of men now living, a proposition to take private property, without the consent of its owner, for a public park, and to assess a proportionate part of the cost upon real estate benefited thereby,

would have been regarded as a novel exercise of legislative power." It was pointed out that Central Park in New York was the first place provided for the inhabitants of any city or town in the United States as a pleasure ground for rest and exercise in the open air, but that in 1892, when the opinion was written, there was scarcely a city of any considerable size in the country that did not have, or had not projected, such parks.

Respondent contends that the municipality, in supplying water to its inhabitants, is engaged in selling water for profit; and seems to think that this, if true, stamps the operation as private and not governmental in character. We first pause to observe that the overhead due to the enormous cost of the system, and the fact that so large a proportion of the water is diverted for public use, rather plainly suggests that no real profit is likely to result. And to say that, because the city makes a charge for furnishing water to private consumers, it follows that the operation of the water works is corporate and not governmental, is to beg the question. What the city is engaged in doing in that respect is rather rendering a service than selling a commodity. If that service be governmental it does not become private because a charge is made for it, or a profit realized. A state, for example, constructs and operates a highway. It may, if it choose, exact compensation for its use from those who travel over it (see *Bingaman* v. *Golden Eagle Lines*, 297 U. S. 626, 628); but this does not destroy the claim that the maintenance of the highway is a public and governmental function. The state or the city may exact a tuition charge for instruction in the public schools; but thereby the maintenance of the public schools does not cease to be a function of the government. The state exacts a fee for issuing a license or granting a permit; for recording a deed; for rendering a variety of services in the judicial department. Do these various services thereby lose their character as governmental functions? The federal Post-Office Department charges for its services; but no one would question the fact that its operation calls into exercise a governmental funciton.

The contention is made that our decisions in *South Carolina* v. *United States*, 199 U. S. 437, 461, 462, and *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172, are to the effect that the supplying of water is not a governmental function; but in neither case was that question in issue, and what was said by the court was wholly un-

necessary to the disposition of the cases and merely by way of illustration. Expressions of that kind may be respected, but do not control in a subsequent case when the precise point is presented for decision. *Osaka Shosen Kaisha Line* v. *United States*, 299 U. S. —, — (February 1, 1937), and authorities cited. The precise point is presented here, has been fully considered, and is decided otherwise. Neither *Ohio* v. *Helvering*, 292 U. S. 360, nor *Helvering* v. *Powers*, 293 U. S. 214, relied upon by respondent, is in point. What has already been said distinguishes those cases from the one now under consideration.

We have not failed to give careful consideration to *Blair* v. *Byers*, 35 F. (2d) 326, and *Denman* v. *Comm'r Int. Rev.*, 73 F. (2d) 193, both of which take a view contrary to that which we have expressed. To the extent of this conflict, those cases are disapproved. Both rely on *South Carolina* v. *United States* and *Flint* v. *Stone Tracy Co., supra*, which we have already distinguished.

Reversed.

Mr. Justice STONE and Mr. Justice CARDOZO, concurring in the result:

We concur in the result upon the ground that the petitioner has brought himself within the terms of the exemption prescribed by Treasury Regulation 74, Article 643, which for the purposes of this case may be accepted as valid, its validity not being challenged by counsel for the Government

In the absence of such a challenge no opinion is expressed as to the need for revision of the doctrine of implied immunities declared in earlier decisions.

We leave that subject open.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 451.—October Term, 1936.

William Whitlock Brush, Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 15, 1937.]

Mr. Justice Roberts, dissenting.

I regret that I am unable to concur in the opinion of the court. I think that the judgment should be affirmed.

There is no occasion now to discuss the dual character of our form of government, and the consequent dual allegiance of a citizen of a state to his state and to the United States, to elaborate the thesis that the integrity of each government is to be maintained against invasions by the other or to reiterate that the implied immunity of the one from taxation by the other springs from the necessity that neither shall, by the exercise of the power to tax, burden, hinder or destroy the operation or existence of the other. There is universal recognition of the truth of these tenets, and of their fundamental relation to the preservation of the constitutional framework of the nation. Our difficulties arise, not in their statement as guiding principles, but, as in this instance, in their application to specific cases.

The frank admissions of counsel at the bar concerning the confusion and apparent inconsistency in administrative rulings as to the taxability of compensation of municipal employees seems to call for an equally candid statement that our decisions in the same field have not furnished the executive a consistent rule of action. The need of equitable and uniform administration of tax laws, national and state, and the just demand of the citizen that the rules governing the enforcement of those laws shall be ascertainable require an attempt at rationalization and restatement.

It seems to me that the reciprocal rights and immunities of the national and a state government may be safeguarded by the ob-

servance of two limitations upon their respective powers of taxation. These are that the exactions of the one must not discriminate against the means and instrumentalities of the other and must not directly burden the operations of that other. To state these canons otherwise: an exaction by either government which hits the means or instrumentalities of the other infringes the principle of immunity if it discriminates against them and in favor of private citizens or if the burden of the tax be palpable and direct rather than hypothetic and remote. Tested by these criteria the imposition of the challenged tax in the instant case was lawful.

The petitioner is a citizen of New York. By virtue of that status he is also a citizen of the United States. He owes allegiance to each government. He derives income from the exercise of his profession. His obligation as a citizen is to contribute to the support of the governments under whose joint protection he lives and pursues his calling. His liability to fulfill that obligation to the national government by payment of income tax upon his salary would be unquestioned were it not for the character of his employer. If the water works of New York City were operated by a private corporation under a public franchise and if the petitioner held a like position with the corporation, there could be no question that the imposition of a federal income tax, measured by his compensation, would be justified. If petitioner, instead of holding a so-called official position under the municipal government of New York City, were consulted from time to time with respect to its water problems his compensation would be subject to income tax. (*Metcalf and Eddy* v. *Mitchell*, 269 U. S. 514.) He is put into an untaxable class upon the theory that as an official of the municipality, which in turn is an arm of the state, he is an "instrumentality" of the state, and to tax him upon his salary is to lay a burden upon the state government which, however trifling, is forbidden by the implied immunity of the state from burdens imposed by the United States. The petitioner seeks to show the reality of the supposed burden by the suggestion that if his salary and the compensation of others employed by the city is subject to federal income tax, the municipality will be compelled to pay higher salaries in order to obtain the services of such persons and the consequent aggregate increase in outlay will entail a heavy financial load. We know, however, that professional services are offered in the industrial and business field; and that

while there is no hard and fast standard of compensation, and men bargain for their rewards, salaries do bear some relation to experience and ability. There is a market in which a professional man offers his services and municipalities are bidders in that market. We know further that those in private employment holding positions comparable to that of the petitioner pay a tax equal to that levied upon him. It is clear that any consideration of the petitioner's immunity from federal income tax would be altogether remote, impalpable and unascertainable in influencing him to accept a position under the municipality rather than under a private employer.

In reason and logic it is difficult to differentiate the present case from that of a private citizen who furnishes goods, performs work or renders service to a state or a municipality under a contract or an officer or employe of a corporation which does the same. Income tax on the compensation paid or the profit realized is a necessary cost incident to the performance of the contract and as such must be taken into account in fixing the consideration demanded of the city government. In quite as real a sense, as in this case, the taxation of income of such persons and, as well, the taxation of the corporation itself, lays a burden upon the funds of the state or its agency. Nevertheless, the courts have repeatedly declared that the doctrine of immunity will not serve to exempt such persons or corporations from the exaction.

The importance of the case arises out of the fact that the claimed exemption may well extend to millions of persons (whose work nowise differs from that of their fellows in private enterprise) who are employed by municipal subdivisions and districts throughout the nation and that, on the other hand, the powers of the states to tax may be inhibited in the case of hundreds of thousands of similar employes of federal agencies of one sort or another. Such exemptions from taxation ought to be strictly limited. They are essentially unfair. They are unsound because federal or state business ought to bear its proportionate share of taxation in order that comparison may be made between the cost of conducting public and private business.

We are here concerned only with the question of the taxation of salaries or compensation received by those rendering to a municipality services of the same kind as are rendered to private employers and need not go beyond the precise issue here presented.

We have no concern with the exaction of a sales tax by the federal government on sales to a state government or one of its subdivisions, or the reverse; we are not called upon to define the power to levy taxes upon real property owned by a state or by the national government. We have no occasion to discuss the power of either government to impose excise taxes upon transactions of the other or upon the evidence of such transactions. Nor are we called upon here to determine the validity of a nondiscriminatory tax upon the salary of a governmental officer whose duties and functions have no analogue in the conduct of a business or the pursuit of a profession, but are both peculiar to and essential to the operation of government. The sole question here is whether one performing work or rendering service of a type commonly done or rendered in ordinary commercial life for gain, is exempt from the normal burden of a tax on that gain for the support of the national government because his compensation is paid by a state agency instead of a private employer. I think the imposition of a tax upon such gain where, as here, the tax falls equally upon all employed in like occupation, and where the supposed burden of the tax upon state government is indirect, remote, and imponderable, is not inconsistent with the principle of immunity inherent in the constitutional relation of state and nation.

Mr. Justice BRANDEIS joins in this opinion.